

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4 — — —

5 IN RE: AUTOMOTIVE WIRE HARNESS
6 SYSTEMS ANTITRUST

MDL NO. 12-2311

7
8 MOTION HEARING

9 BEFORE THE HONORABLE MARIANNE O. BATTANI
10 United States District Judge
11 Theodore Levin United States Courthouse
12 231 West Lafayette Boulevard
13 Detroit, Michigan
14 Thursday, December 6, 2012

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1 Detroit, Michigan

2 Thursday, December 6, 2012

3 at about 10:10 a.m.

4 — — —

5 (Court and Counsel present.)

6 THE CASE MANAGER: All rise.

7 The United States District Court for the Eastern
8 District of Michigan is now in session, the Honorable
9 Marianne O. Battani presiding.

10 You may be seated.

11 The Court calls automotive parts antitrust
12 litigation.

13 THE COURT: Good morning. I apologize again. I
14 don't know what's going on, that's all I can tell you, but
15 I'm glad we are all here ready to go.

16 Before you begin I do have a couple of things that
17 I don't want to forget about. One is I would like someone to
18 enter the orders regarding Fujikura dismissing FAI.

19 MR. PERSKY: Right. There should be orders entered
20 in which --

21 THE COURT: You don't have to tell me what it is,
22 but if you have been dismissed for something please enter
23 your order so that we have the order.

24 Also, an order for the amended dates for the
25 consolidated complaints.

1 MR. WILLIAMS: Your Honor, Steve Williams for the
2 end payors.

3 We will do that. We all spoke, all the plaintiff
4 groups and the defendants this morning, and we would like to
5 propose one adjustment to the date, and then I think I
6 misspoke yesterday in terms of the order. So the dates as we
7 agree will be the instrument panel complaint would be served
8 and filed on January 15th.

9 THE COURT: January 15th. Okay.

10 MR. WILLIAMS: Heating control panel would be
11 February 28th and fuel senders would be April 15th.

12 THE COURT: Okay.

13 MR. WILLIAMS: The last two dates are the dates set
14 yesterday, the only adjustment is the first date and then the
15 order of complaint, which is consistent with what was
16 previously done.

17 THE COURT: The only difference being January 15th,
18 which is fine.

19 MR. WILLIAMS: Yes, Your Honor. I think Mr. Persky
20 has a matter.

21 THE COURT: Mr. Persky?

22 MR. PERSKY: I just want to hand up to the Court
23 and hand out -- my name is Bernard Persky of the Labaton
24 Sucharow firm, co-lead counsel for the end payors.

25 Just finishing off something that was adverted to

1 yesterday. I wanted to hand up to the Court a document we
2 filed with the Court with ECF yesterday, a request for
3 judicial notice which reflects Lear's and Furukawa's press
4 releases referring to their entity as a joint venture, public
5 statements by them.

6 THE COURT: Okay.

7 MR. PERSKY: Here is the request for judicial
8 notice, an extra copy for the defendants. May I approach the
9 bench, Your Honor?

10 THE COURT: Yes.

11 MR. MAROVITZ: Your Honor, Andy Marovitz for Lear
12 Corporation.

13 We'll be formally responding to the request for
14 judicial notice certainly no later than Monday, we will try
15 to actually get it in tomorrow. The judicial notice that is
16 being asked for here isn't really notice of anything at all.
17 There is no question that Lear Corporation and Furukawa at
18 points have described in public statements their -- the
19 Furukawa-Lear Corporation as a, quote/unquote, joint venture.
20 We said that in our opening brief and we said that in our
21 reply brief. There is no news here.

22 What the plaintiffs' request for judicial notice
23 doesn't address anywhere is the fact that it is still a
24 separately incorporated Delaware corporation entitled to the
25 rights under Delaware law, and the shareholders therefore are

1 entitled under Delaware law not to be held vicariously liable
2 for the acts either of a shareholder or of the corporation
3 itself. In this case the Furukawa-Lear Corporation didn't
4 even plead guilty so we are talking about things five times
5 removed.

6 THE COURT: But you are going to submit something
7 in writing?

8 MR. MAROVITZ: Within the next two business days.

9 THE COURT: Okay.

10 MR. PERSKY: Just one word in response, and I
11 promise not to belabor the point.

12 THE COURT: We are opening up arguments here? Go
13 ahead.

14 MR. PERSKY: Lear was listed today but we had
15 agreed we would finish everything yesterday but this issue is
16 still somewhat open. In the direct purchasers' brief in
17 response to Lear's motion they cite numerous cases which talk
18 about the liability of joint ventures. What we pleaded in
19 our complaint, in the end payors' complaint, is that this
20 entity was operated as a joint venture. The request for
21 judicial notice indicates that they called themselves and
22 regarded themselves as a joint venture so that the cases
23 cited in the direct purchasers' brief with respect to joint
24 venture liability are applicable to an entity that acted and
25 represented itself to the public as a joint venture. That's

1 all I'm saying. Those cases are relevant.

2 THE COURT: All right. You said that yesterday. I
3 will allow you to file a reply of a few pages to the
4 defendant.

5 MR. PERSKY: I beg your pardon?

6 THE COURT: You just missed your opportunity. I
7 will allow you to file a reply.

8 MR. PERSKY: After he --

9 THE COURT: Within seven days, and you can have
10 seven days to file yours, I know you said you would have it
11 in two business days but --

12 MR. PERSKY: So after they file theirs I can
13 respond?

14 THE COURT: Right.

15 MR. PERSKY: Thank you, Your Honor.

16 MR. MAROVITZ: Thank you, Your Honor.

17 THE COURT: We do have something to finish up from
18 yesterday though and that's the personal jurisdiction
19 arguments that we didn't get to, Leoni and S-Y Systems.

20 MR. TUBACH: Good morning. Did the Court want to
21 hear arguments about both the personal jurisdiction and the
22 Twombly sort of merits argument from Leoni all at once?

23 THE COURT: I think you can do it all at once.

24 MR. TUBACH: I certainly can. I hope so.

25 THE COURT: Okay.

1 MR. TUBACH: They are intertwined. Thank you, Your
2 Honor. Michael Tubach on behalf of the Leoni defendants.

3 We were working hard to make the Court's job easier
4 here. As the Court knows, the direct purchasers recently
5 dismissed all of the Leoni entities voluntarily from this
6 case entirely.

7 THE COURT: Wait a minute. What do we have -- are
8 you waiting --

9 MR. DAVIDOW: I'm Joel Davidow. I'm arguing for
10 the indirects in the motion we are talking about, and wanted
11 to say something about the order or how it would be carried
12 out.

13 THE COURT: Okay. Do you want to do that now
14 before he continues?

15 MR. DAVIDOW: Yeah. Well, basically --

16 THE COURT: Let's get your appearance, please.

17 MR. DAVIDOW: First name Joel, last name Davidow,
18 D-A-V-I-D-O-W. I'm with the Cuneo Gilbert firm and I
19 represent for this purpose all indirect purchasers, both the
20 dealers and the end payors, in both the case involving Leoni
21 jurisdiction and Leoni merits.

22 And the Sixth Circuit has recognized in Carrier
23 that there is an interdependence in a case like this between
24 the merits and the jurisdiction and therefore my only thought
25 was that we hold the jurisdiction until the -- I'm sorry, the

1 merits -- there be one 30-minute argument by the two of us
2 either now or in two hours, preferably in two hours.

3 THE COURT: Okay.

4 MR. TUBACH: I'm ready to go now.

5 MR. DAVIDOW: Just move the jurisdiction back with
6 the merits, and all the Leoni issues we argue between the two
7 of us and --

8 THE COURT: To separate the Leoni issues?

9 MR. TUBACH: I prefer to do them all at once, Your
10 Honor. We are ready to go. There's no reason not to
11 argue --

12 MR. DAVIDOW: We can --

13 MR. TUBACH: Excuse me, sir. There's no reason --

14 THE COURT: Oops, oops, oops. Wait a minute.
15 Okay. Let's begin with your argument. You may argue both of
16 them.

17 MR. TUBACH: Thank you.

18 MR. DAVIDOW: So 30 minutes apiece?

19 THE COURT: Yes. All right. Go ahead. Don't
20 worry about the time. Go on.

21 MR. TUBACH: I won't need 30 minutes, Your Honor.

22 THE COURT: Okay.

23 MR. TUBACH: As I said, the direct purchasers have
24 dismissed us from the case entirely.

25 THE COURT: Right.

1 MR. TUBACH: As to the indirect purchasers, in
2 other words, the auto dealers and the end payors, they
3 recently agreed to voluntarily dismiss two Leoni entities
4 from the case voluntarily also and completely, and those
5 dismissals have been filed, and so what we are down to now
6 are three Leoni entities only with respect to the auto
7 dealers and the end payors and those three entities are
8 Leoni AG, Leonische Holding and Leoni Wiring System, Inc.

9 I want to start with the Twombly argument, if I
10 could. A lot has been said about Twombly already and I won't
11 repeat it all here. I really only want to say two things.
12 One, that the Sixth Circuit has said a few times now that the
13 plaintiffs have to not just make generic allegations but they
14 have to make specific allegations about the who, what, where,
15 when, how or why of the conspiracy. The plaintiffs say they
16 don't need to do that, but if the Court reads the
17 Sixth Circuit opinion in Carrier Corp. it's quite clear that
18 that's what they need to do. They can't just make
19 generalized allegations of wrongdoing.

20 And the second thing they have to do, and this is
21 most important for Leoni, they have to specify how each
22 defendant was involved in the alleged conspiracy. And the
23 Court -- the Sixth Circuit has said that now twice in
24 Carrier Corp. and in the Travel Agent case. That's
25 critically important for Leoni because as we will talk about

1 in a minute they literally have nothing to suggest that Leoni
2 was involved in any conspiracy that they have alleged. So
3 what the plaintiffs cannot do is make a generalized
4 allegation about defendants, defendants did this, defendants
5 did that, and somehow have that count against Leoni
6 specifically. And as we cited in our brief, generic pleading
7 alleging misconduct against defendants without specifics as
8 to the role each played in the alleged conspiracy was
9 specifically rejected under Twombly, and that's the Total
10 Benefits case.

11 So what do they have other than generic allegations
12 that specifically relate to Leoni? They don't have any
13 allegations that we attended a single meeting, that we
14 participated in any phone calls, that we reached any
15 agreements to price fix at all. For a while they had even
16 named two entities of Leoni that don't even make wire
17 harnesses, the ones that they eventually agreed to dismiss.

18 THE COURT: And there were no pleas?

19 MR. TUBACH: Leoni has not pleaded guilty. There
20 have obviously been guilty pleas by other defendants but
21 those defendants have all been Japanese companies or Japanese
22 national individuals involving sales of product to Japanese
23 companies; Toyota, Subaru and Honda.

24 THE COURT: Any raids?

25 MR. TUBACH: Leoni was the subject of a raid in the

1 European Commission, and I will talk about that in a minute.
2 But as to the U.S. guilty pleas, there is no allegation in
3 the complaint that any of the Leoni entities even sell wiring
4 harnesses to Japanese manufacturers, so they literally have
5 nothing -- there wouldn't be enough anyway that someone else
6 has pleaded guilty to tie that to Leoni, but here they
7 particularly have nothing to suggest that those guilty pleas
8 in any way affect my clients.

9 So they have no allegations of actual wrongdoing.
10 What do they point to? They point to two things; first, that
11 Leoni sells -- some Leoni entities sell wiring harnesses.
12 That obviously is not enough to survive Twombly, and the
13 plaintiffs presumably will not argue otherwise. The fact
14 that Leoni is in the market for wiring harnesses is not a
15 basis to support a conspiracy claim. They argue that, well,
16 Leoni has six percent market share worldwide. That's simply
17 another way of saying we sell wiring harnesses, and there is
18 nothing about having a six-percent market share, which is a
19 pretty modest market share, to suggest that somehow we have
20 the ability as such a small participant in the market to
21 control or dominate or otherwise fix prices.

22 The second thing they point to is the European
23 Commission investigation, and Leoni was raided as part of
24 that, this was now several years ago, and the only thing we
25 know is that nothing has happened yet; there have been no

1 charges filed as that would happen in Europe. And we don't
2 know if the investigation has any relevance to the U.S. at
3 all because we don't know anything about the investigation.
4 An investigation in the U.S. would be irrelevant unless
5 charges have been filed against my client, and the fact that
6 it is pending in Europe makes it even less relevant. We
7 don't know whether the investigation will lead to anything,
8 we don't know whether it will lead to anything relating to my
9 client, and we don't know if it will lead to anything
10 relating to my client that even involves anything with the
11 U.S. market, there are plenty of cars sold in Europe that
12 never make their way over here. So with all of those
13 contingencies, simply pointing to a pending investigation in
14 another jurisdiction is not enough to keep my client in this
15 case.

16 And that's --

17 THE COURT: So as far as you know the European
18 Commission investigation is not resolved?

19 MR. TUBACH: It is not resolved as far as I know.
20 We don't represent the Leoni entities in Europe, they are
21 represented by another law firm there.

22 THE COURT: Uh-huh.

23 MR. TUBACH: But as far as I -- as far as I read
24 the papers and know the investigation is not resolved either
25 way.

1 THE COURT: Okay. All right.

2 MR. TUBACH: So we don't know exactly how it is
3 going to resolve. And so with absolutely nothing to point
4 Leoni into this conspiracy we shouldn't be here, we just
5 shouldn't be here. We have spent -- the client has spent a
6 significant sum of money already on this litigation and the
7 plaintiffs essentially propose to just keep us around as we
8 go through very expensive discovery and class certification
9 and summary judgment and then maybe trial so that maybe they
10 can discover some basis for keeping us in this lawsuit. They
11 shouldn't be able to do that. That's not what -- that's not
12 what Twombly allows, and it is not what this Court should
13 allow either.

14 THE COURT: Okay.

15 MR. TUBACH: Unless the Court has questions about
16 the Twombly aspect of it I will turn to the personal
17 jurisdiction?

18 THE COURT: No.

19 MR. TUBACH: The personal jurisdiction argument
20 relates only to one of the Leoni entities, that's Leoni AG.
21 There was another personal jurisdiction argument that we were
22 making with respect to a separate German entity but the
23 indirect purchasers have dismissed that entity from the
24 lawsuit and so that -- that's Leoni Kabel GmbH, and that's no
25 longer part of this case.

1 And as to Leoni AG the plaintiffs argue there is
2 both general jurisdiction and specific jurisdiction, and I
3 would like to talk first about the general jurisdiction. The
4 plaintiffs do not argue that there is -- that we have any of
5 the traditional contacts that you would generally want to see
6 in order to make a determination that an entity has
7 continuous and systematic contacts with the particular
8 jurisdiction. Instead, they don't argue and they can't argue
9 that we have -- that we sell -- that Leoni AG sells wiring
10 harnesses here, Leoni AG has no phone number here, it has no
11 offices, it has no fax number, it has no agent for service of
12 process here, it doesn't conduct any business in the U.S.

13 Instead, what the plaintiffs argue, is that they
14 can use this theory of jurisdiction called alter ego
15 jurisdiction to basically say, well, there is a U.S.
16 subsidiary of Leoni in the U.S. and they should just be able
17 to basically assume that whatever the U.S. subsidiary was
18 doing is attributable to the German parent because of this
19 alter ego theory of jurisdiction. That theory only applies
20 when the -- if Leoni AG exercises so much control over the
21 U.S. subsidiary that they're really one entity.

22 And courts like Alexander Associates and the
23 Thompson case from the Sixth Circuit both list a host of
24 factors, ten factors each, I think, that go to whether or not
25 there is this essential lack of keeping a corporate distinct

1 between the two entities, it is quite clear looking at those
2 two factors that Leoni AG and the U.S. entities are kept
3 separate.

4 For example --

5 THE COURT: Okay. I was just going to ask you.

6 MR. TUBACH: Yeah, I can just run through them. Do
7 they share principal officers -- this is from the Alexander
8 Associates case. Do they share principal offices? Do they
9 share board members? Does all of the parent's revenue come
10 from the subsidiary? Is all of the capital of the subsidiary
11 provided by the parent? Does the subsidiary buy exclusively
12 from the parent? Is the subsidiary seriously
13 undercapitalized? Does the parent regularly provide
14 gratuitous services to the subsidiary? Does the parent do
15 the payroll for the subsidiary? Do they have -- do they
16 direct the policies and decisions of the subsidiary? Does
17 the parent consider the subsidiary's product essentially to
18 be its own? That's from the Alexander Associates case.

19 And the Thompson case has a similar list of ten
20 factors. Do they basically adhere to corporate formalities?
21 Do they keep separate corporate records? Is there financial
22 independence? Do they share the same employees, business,
23 address, assets, jobs, records, tax returns, financial
24 statements? Do they exert control over the daily affairs of
25 the company?

1 THE COURT: And are any of those factors applicable
2 to --

3 MR. TUBACH: No, we say no. They are a separate
4 company -- they are separate companies and they operate
5 separately. Of course what the plaintiffs point to is that
6 the Leoni group, which is a large company that has, you know,
7 maybe dozens of subsidiaries around the world has, for
8 instance, centralized its research and development facility
9 in one area, or that it has -- that it does marketing on
10 behalf of the Leoni group as opposed to separate marketing
11 for Leoni Wiring Systems, Inc. and Leoni Cable GmbH and Leoni
12 AG.

13 That is simply routine corporate efficiency. It
14 can't be that because they do centralized research and
15 development that somehow every entity has now disregarded the
16 corporate form. That's what an efficient business does, and
17 that's exactly what Leoni AG does.

18 And the only thing else they point to is that at
19 some point one officer of Leoni AG was the CEO of Leoni
20 Wiring Systems, Inc., but there is nothing wrong with one
21 person holding -- wearing two hats. In any event, that ended
22 in 2008, and there has been no allegation that because of
23 that somehow Leoni Wiring Systems, Inc., the U.S. entity, was
24 not able to carry on its own business in its own way in
25 accordance with corporate formality.

1 They make a number of other allegations with
2 respect to Leoni Wiring Systems, Inc., and another German
3 entity that hasn't even been sued in this case, and we
4 suggest that simply is irrelevant. There is nothing about
5 some relationship between whether there are board members who
6 sit here and there between the U.S. subsidiary and an
7 unrelated German entity that has anything to do with this
8 lawsuit. That unrelated German entity is not part of this
9 lawsuit, they have never been part of this lawsuit, and so to
10 point to that doesn't really add to the Court's analysis at
11 all.

12 And so there is really no way that the Court should
13 be able to find that there is general jurisdiction here, that
14 there is such systematic and continuous contact by Leoni AG
15 through its subsidiary because they have simply disregarded
16 corporate form.

17 And so -- they also argue that in addition to
18 general jurisdiction there is specific jurisdiction. As the
19 Court is surely aware, there is a familiar three-part test
20 from Southern Machine about whether or not the Court can
21 exercise specific jurisdiction over Leoni AG. There has to
22 be purposeful availment in the jurisdiction, the claim has to
23 arise from that purposeful availment and the contacts have to
24 be sufficiently substantial that it is reasonable to exercise
25 jurisdiction over the entity.

1 And here we have really the worst kind of
2 bootstrapping. The plaintiffs essentially make two
3 arguments. First, they argue that under a stream of commerce
4 analysis if you sell a product and you specifically direct
5 your product at the forum -- at the forum in which you are
6 being sued that you have purposefully availed yourself of
7 that forum and can be sued there, so if I specifically target
8 Michigan as a place to sell my goods I can't then be
9 surprised if something goes wrong with one of my goods and I
10 get sued in Michigan.

11 When you look at their brief they don't even say
12 that we did that. In three different places of their brief
13 they say if Leoni did this then the stream of commerce
14 analysis would apply, on pages 13, 16 and 17. At first I
15 thought that must have been a mistake that they had done that
16 because surely their allegation is that we did do that, but,
17 in fact, repeatedly they say if Leoni did this there will be
18 jurisdiction. And so their solution is, well, just give us a
19 bunch of discovery and we will figure out if they were part
20 of this conspiracy and if they were part of this conspiracy
21 then there was jurisdiction. That's putting the cart before
22 the horse. They can't simply say we have no idea whether
23 Leoni AG sells these products but we would like to spend a
24 lot of your money figuring it out and if it turns out they
25 don't sell it, well, then, sorry about that. That's no way

1 to go about deciding personal jurisdiction.

2 We have submitted a declaration from Robert Steiner
3 as part of our motion to dismiss which says unequivocally
4 that Leoni AG sells no products. It is a holding company.
5 It doesn't make products and it doesn't sell products. And
6 to allow them to get in through the back door by saying well,
7 we don't really know they do this but we would sure like to
8 find out, that's no way about testing jurisdiction.

9 THE COURT: They are asking for more discovery.

10 MR. TUBACH: Well, they say well, look -- they have
11 not moved for more discovery. They say in their opposition
12 to our motion to dismiss, look, if this effort isn't good
13 enough we would like an opportunity to take some discovery.
14 We don't think they should be allowed to do so. When we
15 filed our motion if they wanted discovery and we filed
16 declarations with our motion, if they wanted to take
17 discovery of Leoni AG to determine whether or not our
18 declarations were accurate or if there was something else
19 that would justify jurisdiction here they could have done so.
20 They never asked us, they never sought any discovery, and to
21 say in the opposition to the motion, well, you know, if this
22 effort doesn't work out we would sort of like to have another
23 shot at it, that's just not reasonable.

24 Particularly, as this Court has held in Brown v.
25 Way, you should not get discovery on jurisdictional issues

1 unless you have made a prima facie showing of jurisdiction
2 and they just haven't done that here at all, and so they
3 should not be allowed to have discovery to try to discover a
4 basis for continuing to exert jurisdiction over Leoni AG.

5 I said the plaintiffs had two arguments as to why
6 there was specific jurisdiction, why there was that
7 purposeful availment. The first was stream of commerce, and
8 the second is this doctrine called the Calder Effect Doctrine
9 from a Supreme Court case called Calder. There it is
10 essentially another bootstrapping argument, which is if you
11 expressly aim your conduct at the forum, the tortious conduct
12 at the forum, and the brunt of the harm was felt there, then
13 you can say well, that's another basis to assert -- that
14 helps the court determine whether -- decide if there should
15 be jurisdiction over that entity. But again, this is just
16 another bootstrapping exercise because they haven't asserted
17 any facts to show that we are involved in any conspiracy that
18 was any conspiracy at all, and certainly no conspiracy aimed
19 expressly at this jurisdiction where the brunt of the harm
20 was felt here, they simply haven't. They have put it in
21 their brief but, again, as with all of their allegations
22 against us they haven't alleged any facts to support it.

23 Your Honor, we should not be here, and I ask the
24 Court to dismiss the remaining three Leoni entities from this
25 case entirely with prejudice.

1 THE COURT: Thank you.

2 MR. TUBACH: Thank you.

3 THE COURT: All right. Response?

4 MR. DAVIDOW: Your Honor, one thing I should
5 mention is that in our reply brief we cited two recent
6 developments within the last week or two, those were an
7 upgrading of the European investigation from an ordinary
8 investigation to what they call a priority investigation -- a
9 priority hearing in the common market against Leoni, and
10 Leoni saying it would cooperate.

11 THE COURT: Wait a second. Tell me again what
12 happened. There was a --

13 MR. DAVIDOW: Well, I can hand up the piece of
14 paper if you would like to see it. It is the one noted in
15 our brief.

16 THE COURT: Okay. Just --

17 MR. DAVIDOW: Here is the piece of paper.

18 THE COURT: Okay.

19 MR. DAVIDOW: It is an official press release of
20 the European antitrust authority, and it says that they are
21 taking their wire harness investigation to a new level. I
22 had the benefit when I was with the antitrust division to be
23 loaned to the common market for three months, so I'm familiar
24 generally with what they are doing. Essentially this kind of
25 hearing was referred to by Mr. Marovitz yesterday.

1 Mr. Marovitz, on behalf of his client, said that there is now
2 what they call a statement of objections, that is this is a
3 formal hearing which begins with a state of objections, we
4 think you have done X, and that his client got a pass, in
5 other words, he said we don't want you any more, but Leoni
6 didn't get a pass, they said we still want you, you are still
7 in for the big show, so that it was exactly the opposite of
8 what happened to Mr. Marovitz's.

9 But to go backwards, the Detroit Automotive News,
10 the Free Press, the Justice Department, everybody else two
11 years ago when the raids came in Detroit said specifically
12 that they were raids coordinated with the E.U., so the
13 original dawn raid on Leoni, which was in the same week as
14 the dawn raids by the FBI in Detroit, were all part of the
15 same enforcement activity, so therefore Leoni two and-a-half
16 years later cannot say that any Government agency has lost
17 interest in them.

18 The question is why should we believe anything has
19 happened in Europe? Well, if you look back at what else is
20 occurring at the moment, in that same press release and the
21 Bloomberg article that follows, they note that the raid and
22 the priority hearing is against Leoni, it is against S-Y and
23 it is against Yazaki.

24 Now, Yazaki is sort of the world's greatest price
25 fixer, they have been fined \$470 million, the second highest

1 fine in the history of the antitrust laws, and it is Yazaki
2 that is being investigated with Leoni concerning whether the
3 two of them conspired on bids for wire harnesses in Europe,

4 Now, in the same period of time, not mentioned by
5 Leoni is that having had a whole series of Japanese
6 indictments the antitrust division indicted a Swedish
7 company, Autoliv, which makes seat belts, and Autoliv pleaded
8 guilty. So this is a European company indicted for auto
9 parts violation and pleading guilty. They followed that with
10 TRW Deutschland which makes other products, I think also
11 occupant safety, and TRW Deutschland also pleaded guilty. So
12 we are now getting a spat of guilty pleas coming out of
13 Europe.

14 We know from the -- in the annual report, the 2011
15 annual report of Leoni, that they make the wire harnesses for
16 Volkswagen, for Nissan cars, for Land Rovers, for Jaguars,
17 for BMWs and for Mercedes. These are all cars in which the
18 biggest or the second biggest market is going to be United
19 States and Detroit.

20 THE COURT: And yet they only have about six
21 percent market share?

22 MR. DAVIDOW: Well, they may have about 18 percent
23 in Europe, they have six percent worldwide but they are
24 primarily in Europe. As far as we can see, they are one of
25 the three major players in Europe. So if they sell wire

1 harnesses to all of these major Europeans and they are
2 selling against Yazaki, the question is either they are going
3 to be in bed with Yazaki or they are not. And the answer is,
4 is this upgrading of the investigation from just looking at
5 the documents to a priority hearing a plus factor sufficient
6 to keep our Twombly motion alive? And we say absolutely,
7 that we had coordinated U.S. and European investigations
8 resulting two and-a-half years later in a full hearing in
9 front of the commission, which is to start soon, in which
10 some companies like Mr. Marovitz's were given a free pass and
11 Leoni was saying don't go anywhere, you are still in. So
12 that is where we are for now.

13 THE COURT: So are you saying that it is basically
14 the fact that this investigation has been upgraded --

15 MR. DAVIDOW: Yes.

16 THE COURT: -- is the basis to keep your case alive
17 here?

18 MR. DAVIDOW: Well, we start the other way around,
19 which is that if Leoni is in general a competitor of Yazaki
20 and Furukawa and if Yazaki and Furukawa plead guilty in
21 indictments which say they pleaded guilty to conspiring with
22 co-conspirators. Remember there was a comment yesterday
23 about some bilaterals in which Justice said you did one
24 company or one -- with only one co-conspirator. Both the
25 Furukawa and the Yazaki indictment say companies and

1 co-conspirators so the question is, well, who are the other
2 guys in the world market? There are only four or five names
3 around. And the more recent indictments, for instance,
4 TRW Deutschland, if it is fixing prices it is obviously going
5 to be fixing them to people in Deutschland.

6 And the other point we go back to is these cases
7 began when the Japanese started to make their cars here and
8 then the parts companies came here and apparently carried out
9 their traditional way of doing things, which is to whack up
10 the bids in one way or another, but shortly thereafter, and
11 we know it from this announcement, Yazaki, the head price
12 fixer, moved to Europe in two ways; it opened the London and
13 French office to make wire harnesses and bid for them because
14 it wanted European business, and Furukawa started bidding in
15 Europe, and they were bidding against obviously Leoni, so
16 they either had to make peace with Leoni or lose out on the
17 bids. So we are saying it is an enormous plus factor that
18 out of three or four people in the market when you have
19 guilty pleas by the major people they are bidding against
20 that it is highly probable, and it doesn't have to be highly
21 probable, it has to be plausible.

22 Now, let me turn for a moment to the stream of
23 commerce jurisdiction point. The Carrier case cites Rita and
24 Turner as saying in international antitrust 12(b)(2) and 12
25 (b)(6) become interdependent. There is that point, which is

1 our contention, is that Leoni, Furukawa and Yazaki as being
2 investigated in Europe fixed bids on wire harnesses for cars
3 like Volkswagens and Mercedes which were then shipped
4 obviously to Detroit, America, whatever you want to say, and
5 that that creates what we used to call long-arm jurisdiction
6 in Michigan. That is just as if they sent a motorcycle which
7 had a bad part and exploded on the street in Detroit, you
8 would have tort long-arm jurisdiction. In this case if it is
9 a price-fixed component of the car which causes the car to
10 cost more to the people of Detroit, of the United States,
11 there is long-arm jurisdiction.

12 And that is not just my theory, Judge Ilston is a
13 very fine judge in California that had a case involving the
14 LCDs that go into computers, and defense motion was made to
15 say, well, leave us alone, we just are Japanese who sell to
16 Japan and somebody else takes it to America, you have no
17 jurisdiction. And she said of course we do. You aimed a
18 product, just like in the Asahi case with a bad motorcycle
19 part, we do have jurisdiction.

20 So the point then is if our theory of jurisdiction
21 over Leoni based on the priority investigation, the people
22 they bid against and so on and their guilty pleas, is the
23 selling of these cars which come here containing price-fixed
24 products, if we -- if you decide on the basis of what I have
25 said to find that we meet a plausibility standard and allow

1 us to go to discovery and that discovery shows that Leoni did
2 exactly what we say it did, namely conspired with Yazaki and
3 Furukawa, we will at the moment we establish our merits case
4 establish our long-arm jurisdiction case.

5 So the point of this is the most economical way for
6 you as a judge to handle this is to look first at Twombly.
7 If what I have handed you plus the guilty pleas of the other
8 people they bid against is viewed as enough of a plus and we
9 are allowed to go forward, then you won't know whether we
10 have a 12(b)(2) long-arm thing until you know whether they
11 are guilty. So at the moment we establish substantive guilt
12 we also would have established long-arm jurisdiction.

13 Now, if we had to establish long-arm jurisdiction
14 starting now we have an obvious fact which is to start with a
15 very misleading statement. Mr. Steiner puts in an affidavit
16 and said Leoni AG is just a holding company. You say, wait a
17 minute, the whole wire harness business, the thing that
18 controls the sales, the strategy, who does what, who bids
19 what, is called the wire harness division. Now, when I
20 learned corporate law if something is called a division it
21 means it is not separately incorporated. So if wire harness
22 is a division of Leoni AG, it is Leoni. We don't have to
23 talk about it as an alter ego, it is a division of AG which
24 claims not to be in business but all it is saying is, well --
25 and then we find out who is the head of Leoni, and it is a

1 man called Mr. Layman, and who is the head of wire harness
2 division, well, it happens to be the same guy. So Leoni's
3 lawyer now says, well, yes, he wears two hats but since he
4 has -- one hat is kind of a general holding company,
5 accounting guy, and one hat to sell wire harnesses, you can't
6 say it is an alter ego because he's wearing a different hat.
7 Well, that's nonsense, simply nonsense.

8 So the immediate answer is Leoni is a unitarian
9 company in the wire harness business, the entire business is
10 run out of Mr. Layman and AG and therefore we would have
11 alter ego now even though we don't need it because we should
12 be -- we think we have easily met the plausibility standard
13 and we should go forward with the merits and the long-arm
14 jurisdiction should await the result -- if we lose the merits
15 we'll lose the long-arm jurisdiction.

16 Thank you very much.

17 THE COURT: Thank you.

18 MR. TUBACH: Thank you, Your Honor. I will be
19 brief.

20 THE COURT: All right. Go ahead.

21 MR. TUBACH: Opposing counsel spent quite a bit of
22 time reciting facts about various things. We supposedly have
23 an 18 percent market share in Europe, we sell to Mercedes,
24 BMW and others. None of those facts are anywhere in the
25 complaint. He's simply standing up here and making it up.

1 It may be true, it may not be true, I'm not saying either
2 way, but you can't get to a hearing on a 12(b)(6) and start
3 adding facts to the record. He's handing up press releases
4 talking about an upgrade to a European Commission
5 investigation. Well, that very press release -- and we do
6 object to the introduction of additional evidence outside the
7 fact of the complaint, but it is nothing that is particularly
8 relevant anyway. The opening as their own evidence suggests
9 here -- I'm quoting, the opening of proceedings means the
10 Commission will treat this case as a matter of priority --
11 whatever that means -- without prejudging the outcome of the
12 investigation.

13 So what exactly does this upgrade tell us? It
14 tells us exactly nothing. Even if the European Commission
15 goes forward and files charges against Leoni AG and Leoni AG
16 is found to have done something wrong and admits it did
17 something wrong, we have no idea whether it has anything to
18 do with the U.S. market, no idea, and Mr. Davidow certainly
19 has no basis for alleging that way. So to claim that now
20 there has been some kind of upgrade recently that that alone
21 justifies keeping Leoni in this case is really not right.

22 He mentioned that Autoliv -- that somehow because
23 European companies have started to be charged that somehow
24 that has something to do with Leoni. Autoliv is a Swedish
25 company, not a German company, a Swedish company, and they

1 make seat belts. We don't make seat belts so I don't think
2 that allegation has really -- it is not an allegation, the
3 assertion by counsel gets them anywhere.

4 THE COURT: What about the argument of the
5 division, you know, that Leoni AG somehow they do what, the
6 advertising and they seem to allege that they do more than
7 that for every Leoni group?

8 MR. TUBACH: Well, I heard that here today. I
9 don't think that's accurate, certainly not anything they have
10 put in the record. Of course, there is a -- there is a
11 separate corporate forum in terms of one part of their
12 business and another part of their business, and one part of
13 their business is wire harnesses, but that doesn't mean that
14 Leoni AG runs everything for every subsidiary. That's
15 just -- there is nothing in the record to support that and it
16 is not accurate. The fact that they have centralized
17 research and development doesn't mean that the U.S. entity
18 isn't a separate entity, and he simply asserts without any
19 proof in the record that Leoni AG runs every business itself.
20 It's simply not true.

21 The only thing they have pointed to with respect to
22 Leoni AG that is a fact is that at some point prior to
23 2000 -- or until 2008 at some point one manager at Leoni AG
24 was also the CEO of Leoni Wiring Systems, Inc., that's it.
25 That's not a sufficient basis to say that these -- that all

1 of these different corporate entities have just disregarded
2 the corporate forum and should be treated as one for
3 jurisdictional purposes. That can't be enough or you would
4 never have any efficiencies in a global enterprise. A global
5 enterprise has to have consolidated research and development
6 facilities and has to coordinate its marketing efforts and
7 should have one website, not 75 websites, for customers to go
8 look at what it is that Leoni as a company is trying to do,
9 but that doesn't mean that for jurisdictional purposes you
10 get to throw away all of the corporate formality and treat
11 them all as one. That simply doesn't make sense. That's not
12 what the cases say, and there is no evidence in the record to
13 suggest that the kind of factors that the Thompson court and
14 that Alexander Associates look at to determine whether or not
15 you can assert alter ego jurisdiction, that any of those
16 factors are present here sufficiently to allow the Court to
17 say I don't care that Leoni AG is a separate entity in
18 Germany from Leoni Wiring Systems, Inc., I'm going to ignore
19 that and treat them all the same.

20 THE COURT: All right.

21 MR. TUBACH: Thank you very much.

22 THE COURT: Thank you very much. Okay.

23 MR. DAVIDOW: May I have a moment of rebuttal?

24 THE COURT: We are into surrebuttal again. Yes, go
25 ahead, a moment.

1 MR. DAVIDOW: Well, there were a couple statements
2 made there about what is in the record or not. The -- there
3 were a number of Leoni briefs, one of them was put in by the
4 direct payors, it had as Exhibit A something one can get off
5 of Google or the Internet, which is the 2011 annual report of
6 Leoni. I have it in my hand, this is the 2011 report. First
7 of all, Leoni's lawyer has said that, well, how do you know
8 that they make all of these cars? Well, I'm going to hand up
9 their annual report. And secondly, they said, oh, this
10 Mr. Layman, well, four years ago he might have had this
11 position of being the head of Leoni AG and the head of Leoni
12 wire harnesses. Well, there is a second tab right here and
13 it says in 2011 Mr. Leoni (sic) is both the management board
14 and head of the wire system. I will hand this up if I can
15 hand it?

16 THE COURT: We already have it, don't we?

17 MR. DAVIDOW: It is Exhibit A, and I'm looking at
18 page 7 and page 29. Page 7 is a chart of the cars they
19 service, the Mercedes and Volkswagen and so on. Page 29 is
20 the list of who is on the management board and who is the
21 head of the wiring system in 2011. The statement that he
22 stopped being that in 2008 is just wrong. Thank you.

23 MR. TUBACH: 15 seconds, Your Honor? My point
24 about what happened in 2008 had nothing to do with the wiring
25 systems division, it had to do with whether Mr. Layman was

1 serving on the board of Leoni Wiring Systems, Inc., that's
2 what the plaintiffs alleged was the basis -- these plaintiffs
3 allege was the basis to keep -- to assert alter ego
4 jurisdiction between Leoni AG and Leoni Wiring Systems, Inc.,
5 that relationship came to an end in 2008.

6 THE COURT: All right. Thank you.

7 S-Y Systems jurisdiction issues?

8 MS. STORK: Yes.

9 THE COURT: May I have your appearance, please.

10 MS. STORK: Good morning. My name is Anita Stork,
11 I'm with Covington & Burling. I represent Defendant S-Y
12 Systems Technology Europe GmbH, or hereinafter S-Y Europe for
13 the convenience of the Court.

14 We also have a 12(b)(2) motion to dismiss for lack
15 of personal jurisdiction, and although we did not bring a
16 separate 12(b)(6) motion to dismiss on Twombly grounds we
17 joined in the joint defense motion on those grounds.

18 THE COURT: Yes.

19 MS. STORK: Because so much of what the plaintiffs
20 have put in the record -- or tried to put in the record in
21 opposition to the personal jurisdiction motion is actually
22 attempts to try to claim that they have pleaded a viable
23 claim against S-Y Europe. Some of what I'm talking about
24 will also go to the argument that they are trying to
25 bootstrap jurisdiction onto price-fixing claims which they

1 have utterly failed to make.

2 S-Y Europe has also been dismissed similar to a
3 couple of the Leoni entities by the direct purchasers, so the
4 motion now is addressed to the two indirect purchaser cases,
5 the end payor and automobile dealer cases.

6 Of course, the Court knows the standard for a
7 12(b)(2) motion, which is that the Court can consider sworn
8 facts outside of the face of the complaint, and with its
9 moving papers S-Y Europe submitted a declaration from one of
10 its employees in Europe, Mr. Giroux, and those facts are
11 uncontroverted by anything that the plaintiffs have put in
12 the record.

13 Now, what's in this declaration? What are the
14 sworn facts that are in the record? The sworn facts are that
15 S-Y Europe is headquartered in Germany, that S-Y Europe has
16 never, I repeat never, been licensed to do business in the
17 United States, has never been incorporated in the United
18 States and has never had officers in the United States. They
19 have never had manufacturing or sales facilities either
20 directly or through subsidiaries in the U.S., and S-Y Europe
21 has never had any subsidiaries located in the U.S., and
22 lastly, but certainly not least, S-Y Europe has never, never
23 sold automotive wire harness systems for mass production for
24 automobiles in the United States. So those are the sworn
25 facts in the record.

1 Now, what do we have from the plaintiffs in their
2 opposition? The plaintiffs submitted an affidavit but it was
3 an affidavit attaching outside documents, documents that are
4 created -- that have been created by third parties, and there
5 is nothing in the affidavit that authenticates the supposed
6 facts considered within the documents. So this Court
7 certainly could be at liberty, we would argue, to consider
8 everything that is in those -- in the exhibits to the
9 plaintiffs' affidavit as hearsay. But even if the Court
10 takes a look at what is there, it certainly doesn't lend any
11 weight to their argument that they have personal
12 jurisdiction, that the Court has personal jurisdiction over
13 S-Y Europe, or certainly that there has been any kind of
14 viable claim stated against S-Y Europe because if you read
15 the plaintiffs' brief, the arguments they make, it really is
16 a bootstrapping argument similar in some way to what
17 Mr. Tubach was talking about in the Leoni situation. They
18 are trying to bootstrap a claim that they have sufficiently
19 stated a price-fixing claim against S-Y Europe and therefore
20 the Court should exercise jurisdiction, and it is just not
21 the case that they have stated the claim or that that should
22 be the analysis, that is putting the cart before the horse to
23 claim that they have stated a claim against S-Y Europe and
24 therefore there should be jurisdiction.

25 THE COURT: Has S-Y Europe been involved in pleas

1 and/or raids of any kind?

2 MS. STORK: Absolutely happy to run through that
3 for you, Your Honor. S-Y Europe has not been the subject of
4 any pleas. Plaintiffs have not alleged that they have been
5 the subject of any investigation in the United States. They,
6 like some other entities, have been -- were the subject of a
7 raid in the E.U., but, again, an investigation does not lend
8 weight to pleading an antitrust claim, and it is particularly
9 more attenuated when the investigation is overseas in Europe.
10 We have the Graphic Processing case, we also have the
11 Elevator antitrust case which clearly states you've got to
12 show some linkage between an investigation in Europe and
13 anything that is going on in the U.S. You can't simply say
14 because it happened there it happened here, it is not the
15 law.

16 The minimum contacts test, which was just run
17 through, which is the Southern Machine test. In order for
18 plaintiffs to claim specific jurisdiction over S-Y Europe
19 they have to show, one, that S-Y Europe purposefully availed
20 itself of the privilege of acting in the United States, the
21 cause of action has to arise from the defendant's activities
22 in the forum, and the acts of the defendant or consequences
23 must have substantial enough connection with the forum to
24 make the exercise of jurisdiction reasonable.

25 So let's just take a quick look at what the

1 plaintiffs claim they have put forward that satisfies each
2 one of those elements -- independent elements that have to be
3 met. As to purposeful availment, plaintiffs claim that and
4 they rely on a press release which is more than ten years old
5 that at the time, and this is ten years ago, that S-Y Europe,
6 which is a joint venture, was created. There was another
7 joint venture create called S-Y America. Plaintiffs claim
8 that according to the press release it was thought or perhaps
9 forecast that these two entities, S-Y Europe and S-Y America,
10 might work together on certain projects. Plaintiffs have no
11 evidence in the record that these two ever communicated and
12 if they did what they talked about, that's simply
13 insufficient to claim that from this press release you can
14 infer that S-Y Europe had contacts with the United States,
15 and, by the way, S-Y America is no longer a defendant in this
16 action.

17 Plaintiffs also have a stream of commerce argument
18 which, again, I think the argument heading is very telling
19 because the plaintiffs claim the argument heading and their
20 argument is that S-Y Europe placed automotive wire harness
21 systems in the stream of commerce after having fixed prices.
22 So, again, they are jumping to the conclusion and just
23 assuming, oh, they fixed prices and, of course, then they
24 must have placed products in the stream of commerce that was
25 targeted at the United States. It is simply again the wrong

1 order of analysis. It can't simply assume that they stated a
2 claim against S-Y Europe and therefore --

3 THE COURT: What do they base their claim in their
4 complaint on the fixed pricing, how do you fix prices?

5 MS. STORK: Well, there again we go back to have
6 they put anything in the record about the who, what, when or
7 why or the specifics of what S-Y Europe did or supposedly did
8 or allegedly did. What they have are some very generic
9 non-specific allegations of defendants conspired to inflate
10 prices. Well, that doesn't tell me if S-Y Europe went to
11 meetings, if they had telephone calls, who they talked to,
12 nothing, nothing in the record on that effect. I mean, what
13 they are hanging their hats on is the fact of the E.U.
14 investigation and that's largely the sum and substance of it.

15 THE COURT: Okay.

16 MS. STORK: I guess I would also add as well too
17 that they have tried to put some things in the record about
18 S-Y Europe's relationship with BMW but, again, there is no
19 allegations -- nothing that has been put in the record to
20 suggest that S-Y Europe has any connection with the pleas
21 because those again were to Japanese car manufacturers, the
22 pleas reference sales to Japanese car manufacturers, and
23 S-Y Europe does not sell to Japanese car manufacturers.

24 I think just on the reasonableness prong, given all
25 of those things it is absolutely unreasonable to try to

1 exercise jurisdiction over S-Y Europe when the uncontroverted
2 facts again are that S-Y Europe doesn't have employees here,
3 it is headquartered in Europe, and has never sold automotive
4 wire harnesses for mass production in the United States.

5 Plaintiffs also try to use a conspiracy theory of
6 jurisdiction and, you know, we submit, Your Honor, that they
7 are far short of the minimum factual support which is needed
8 in order to make a conspiracy theory of jurisdiction fly.
9 And to that end we think that this factual situation is
10 completely on all fours with what the Court faced in
11 Weather Underground and where the Court found that the
12 minimal factual support had not been made in order to use a
13 conspiracy theory of jurisdiction.

14 My last point has to do with jurisdictional
15 discovery. We are in the same situation, plaintiffs did --
16 as Leoni. Plaintiffs did not raise any argument that they
17 needed jurisdictional discovery until they lobbed it in with
18 their brief. At no time did they say during the briefing
19 period we want to depose Mr. Giroux or we need some discovery
20 in order to properly get the facts on the record for the
21 Court to have a factual record which might have included what
22 plaintiffs are now trying to get in through a lot of hearsay
23 exhibits.

24 We don't belong here, S-Y Europe doesn't belong
25 here, and as a foreign defendant and as a foreign-based

1 company under Asahi they really should not have to go through
2 the expensive, time-consuming, burdensome hassle of being a
3 defendant in a U.S. antitrust court.

4 THE COURT: Let me ask, does S-Y sell wire
5 harnesses for autos that are sent into the United States?

6 MS. STORK: For purposes of this I would just say
7 they don't sell harnesses into the United States for mass
8 production in the United States.

9 THE COURT: Who do they sell to?

10 MS. STORK: They sell to BMW.

11 THE COURT: Just BMW, but there are a lot of BMWs
12 in the United States?

13 MS. STORK: Yeah, there are a lot of BMWs, and it
14 may or may not be that some of their harnesses have come into
15 the United States.

16 THE COURT: Okay. Thank you.

17 MS. STORK: Thank you, Your Honor.

18 THE COURT: Response?

19 MR. BURNS: Good morning, Your Honor. Warren Burns
20 with Susman Godfrey. Today I will be arguing for both the
21 end payors and the dealers.

22 Now, Your Honor, I'm from Dallas, Texas and I would
23 note --

24 THE COURT: Welcome.

25 MR. BURNS: -- I have boots, I didn't wear them

1 today because I didn't think it would be necessary and, in
2 fact --

3 THE COURT: I bet you wish you had them and your
4 gloves when you were outside.

5 MR. BURNS: I do, I do. Your Honor, I think it
6 would be useful to ground us in the facts in this case and
7 also with the standards -- the legal standards applicable
8 here.

9 As you are more than aware, our burden in
10 demonstrating personal jurisdiction at this stage is very
11 slight, we have a burden to show a prima facie case in
12 support of jurisdiction, and I believe the well-pled facts as
13 well as the facts we placed forward in the affidavit and in
14 our opposition brief establish and meet that burden in this
15 case.

16 I would like to start briefly on this issue of
17 hearsay touched on by counsel and in their motion. Counsel
18 would essentially have Your Honor ignore the affidavit placed
19 in our response papers. Now, in fact, it is crystal clear in
20 the law that once the defendants have submitted an affidavit
21 of their own, we are entitled to submit an affidavit in
22 response.

23 The defendant relies on a case called Almond vs.
24 ABB Industrial Systems, which points out the error in their
25 argument. In that case there had been jurisdictional

1 discovery which had not been availed of by the plaintiffs,
2 plaintiffs submitted an affidavit which contained hearsay
3 documents, and the court found that no hearsay exceptions
4 were applicable that would permit the documents to come in.

5 That's not the case here. There has been no
6 jurisdictional discovery, and in this case the document --

7 THE COURT: You didn't ask for any prior to this
8 personal jurisdiction motion.

9 MR. BURNS: Yes, Your Honor. If I may respond to
10 that?

11 Your Honor will recall that there were a series of
12 negotiations between the plaintiffs and the group of
13 defendants on matters touching on discovery that led to the
14 entry of the CMO. At that time we understood the plaintiffs
15 were clearly opposed to discovery and perhaps we read too
16 much into it but we assumed that that included a position on
17 jurisdictional discovery and that was their position.

18 Now, in point of fact even without -- even without
19 jurisdictional discovery I think we have met our burden in
20 this case. The documents we have submitted in our affidavit
21 are admissible under the hearsay exception including
22 Rule 807, which is the catchall provision, which requires in
23 part that the documents submitted are in essence the best we
24 can obtain at the time, and that's certainly true and --
25 that's certainly true without full jurisdictional discovery.

1 Back to the essential facts in this case, Your
2 Honor, as alleged and pleaded by the indirect purchasers. As
3 Your Honor is aware, S-Y Europe was a joint venture between
4 Continental AG and Yazaki. It was tasked with being the
5 strategic lead for the BMW account. It is undisputed that
6 Yazaki, S-Y's parent, had pleaded guilty to engaging in a
7 conspiracy to fix the price of wire harnesses.

8 It is also undisputed that the June 10th, 2010
9 European Union -- that on June 10th, 2010 European Union
10 antitrust authorities raided the offices of S-Y and Yazaki on
11 the belief that S-Y and its corporate parent may have
12 participated in a cartel.

13 Now, in our opposition papers we presented as well
14 a statement by Continental AG, S-Y's other corporate parent,
15 which acknowledges the raid and in the same paragraph
16 references internal investigations that may or may not have
17 referred to S-Y's participation in anticompetitive
18 activities.

19 The consolidated amended complaint specifically
20 alleged that S-Y conspired with Yazaki, its corporate parent,
21 and other co-conspirators in fixing the price of wire
22 harnesses. And the response we hear from the defendants is
23 telling, I believe. One, there is no express denial of the
24 conspiracy or anticompetitive conduct with respect to these
25 specific allegations, and there is no specific denial of the

1 underlying facts in the affidavit we submitted in our
2 opposition, particularly with respect and relevant here to
3 the jurisdictional analysis. The fact is that S-Y Europe
4 provides wire harnesses to BMW and that BMW imports tens of
5 thousands of vehicles into the United States every year.

6 I will turn to our argument on personal
7 jurisdiction and start with our argument with respect to
8 specific personal jurisdiction. I think the central issue
9 here in dispute between the parties centers on this
10 purposeful availment prong of the three-part test that was
11 annunciated in Carrier and the numerous other cases. Under
12 this purposeful availment prong, again, I think we have met
13 our burden. The problem is satisfied in this case because
14 S-Y provided the wire harnesses to BMW with the knowledge and
15 with the intent that those wire harnesses would travel with
16 BMW's completed automobiles to the United States, would be
17 sold there, and in the context of a price-fixing conspiracy
18 would be sold at anticompetitive prices.

19 Now, here and as we have heard this morning there
20 is no denial of the simple fact that S-Y provides those wire
21 harnesses to BMW. We saw that there was an affidavit from
22 Dr. Giroux sort of artfully dealing with this issue and
23 stating that there was no export of wire harnesses to the
24 U.S. for mass production here, but as Your Honor questioned
25 this morning and elicited the response, wire harnesses are

1 provided to BMW and BMW cars travel to the United States.

2 Now, we clearly think this satisfies the purposeful
3 availment arm, and I think there is no credible argument to
4 the contrary. To suggest to the contrary that the actions
5 that S-Y has taken in commerce that lead to the export of its
6 wire harnesses to the United States does not satisfy the
7 purposeful availment arm would essentially absolve all auto
8 parts manufacturers of any liability here in the United
9 States for participating in a cartel.

10 Now I will turn briefly, Your Honor, to our
11 conspiracy theory of jurisdiction. I won't spend a lot of
12 time here because I think frankly we have met our burden with
13 respect to specific jurisdiction, but here I will say that
14 under the conspiracy theory we have met the basic elements
15 there. We have established from a pleading standpoint S-Y's
16 participation in the conspiracy, the participation with its
17 corporate parent, the participation with other
18 co-conspirators as evidenced by the EU raids.

19 THE COURT: But you don't allege who those other
20 co-conspirators are.

21 MR. BURNS: Well, I think our complaints, Your
22 Honor, specifically reference Leoni, for example, they
23 reference various wire harness manufacturers, so in the
24 context of this overarching conspiracy that we have alleged I
25 think we have pleaded specifically numerous other

1 co-conspirators. Now, is it possible there are other
2 non-named co-conspirators, that is possible, Your Honor.

3 So finally, Your Honor, I will close by saying that
4 should Your Honor not be satisfied with the showing we have
5 made thus far we would ask for limited jurisdictional
6 discovery going forward.

7 THE COURT: What do you propose if you got
8 discovery, what would you be looking for?

9 MR. BURNS: Well, Your Honor, I think we would
10 certainly focus on the facts establishing purposeful
11 availment, we would want to know more about S-Y's
12 relationship with BMW, the amount of commerce it flows into
13 the United States, S-Y's intentions with respect to that
14 commerce. We would also want to know -- or we would also
15 want discovery relating to disputed facts about S-Y's
16 relationship with S-Y America, with Yazaki, all of those
17 facts have been thrown into contention here.

18 Obviously it is within your discretion, Your Honor,
19 but we feel that discretion is warranted here given the
20 disputed facts in this case.

21 THE COURT: Okay.

22 MR. BURNS: Thank you, Your Honor.

23 MS. STORK: Short rebuttal?

24 THE COURT: Yes.

25 MS. STORK: First of all, as to counsel's statement

1 that they have alleged that S-Y Europe conspired with its
2 parent, which is Yazaki, there is absolutely nothing in the
3 complaint that supports any allegation that the corporate
4 forum has been ignored, and there is no specifics at all
5 about any types of meetings or agreements or exchange of
6 information between Yazaki and S-Y Europe, so there's simply
7 nothing in the complaint to support that corporate forum has
8 been ignored or that there is specifics of meetings between
9 Yazaki, there's certainly not specifics of meetings or
10 agreements or whatever with --

11 THE COURT: That's what I was getting at before, we
12 have the overarching conspiracy theory but we don't have any
13 specifics?

14 MS. STORK: Right. Thank you, Your Honor.

15 THE COURT: All right. Thank you very much. Thank
16 you.

17 All right. Now we will go into the collective
18 motions for the end payors and automotive dealers.

19 MS. SULLIVAN: Good morning. My name is
20 Maggie Sullivan of Latham & Watkins representing the Sumitomo
21 defendants.

22 I will be arguing the Twombly standing and briefly
23 the injunctive relief portions of the collective motion to
24 dismiss the indirect purchasers' complaints, and then
25 Ms. Fischer from Jones Day will be arguing the state specific

1 arguments.

2 THE COURT: Wait a minute, go back because you were
3 going kind of fast. Ms. Sullivan, you represent
4 which --

5 MS. SULLIVAN: The Sumitomo defendants.

6 THE COURT: Sumitomo.

7 MS. SULLIVAN: But I'm speaking on behalf of all
8 the defendants for this argument.

9 THE COURT: Okay.

10 MS. SULLIVAN: Your Honor, I'm not going to stand
11 up here and tell you that none of these defendants did
12 anything wrong, clearly some did. I'm also not going to tell
13 you that none of these defendants should ever have to defend
14 themselves in a civil case or make restitution to any parties
15 that it may have harmed, but not this case and not these
16 plaintiffs.

17 The indirect purchasers that have brought these
18 claims are not the proper party. The very nature of a class
19 action is that it is a claim that a group of people were
20 suffered -- or suffered injury that was generalized in
21 nature, and that's what the plaintiffs assert here, that car
22 dealers all around America and every person who purchased a
23 car in 23 states over a ten-year period was injured by the
24 defendants' conduct, but there is a big difference between
25 targeted behavior and generalized behavior and there is a big

1 difference between a potential claim by an OEM that might
2 allege that its injury was direct and foreseeable because it
3 paid an artificially inflated price for a wire harness or a
4 connector or an ECU and a claim that that injury translates
5 into millions of people downstream from that sale paying more
6 for entirely different products that contain thousands of
7 other components.

8 Targeted versus generalized behavior, direct
9 effects versus remote indirect effects. The defendants are
10 entitled to have those essential differences be part of this
11 dialogue as we are discussing the scope and contours of this
12 case, and that's why we have brought this motion. The
13 question that this Court must decide is whether these
14 plaintiffs have sufficiently and plausibly alleged that they
15 were injured because of any defendant's conduct, and the
16 answer is that they have not done so.

17 Now, we have made a number of different arguments
18 in our motion and some apply to different portions of the
19 indirect purchasers and different claims so I have handed up
20 a slide deck that looks like this, a blue cover.

21 THE COURT: Okay.

22 MS. SULLIVAN: The first slide there is a clarity
23 that just breaks out our claims -- our argument -- what the
24 argument is and then who it applies to and what the result
25 should be. I'm going to be focusing on, as I said, the

1 Twombly argument and the standing arguments, and then briefly
2 the injunctive relief argument.

3 I will just touch on Twombly briefly because it was
4 covered a lot yesterday so I won't spend a ton of time on it.
5 The indirect purchasers' complaint fail for the same reasons
6 as the direct purchasers' complaint; they don't state facts
7 that support the broad industry-wide conspiracy that they
8 have alleged, but there are additional deficiencies with the
9 indirect purchasers' complaint because they are in a
10 different position than the directs. Because they are
11 indirect purchasers to claim an injury they have to
12 establish plausibly -- they have to plausibly allege that any
13 overcharge that an OEM paid for a wire harness or a connector
14 or an ECU was passed through the chain of distribution to
15 them.

16 Now, yesterday Your Honor asked what the term
17 plausible means, and I agree with Mr. Cherry and Mr. Cooper
18 who said that it is something more than speculative, it is
19 something more than possible, but the way I think about it is
20 does this make sense? Does this all make sense? When you
21 look at all of their allegations as a whole does it make
22 sense based on the facts that they have alleged that these
23 plaintiffs were injured by any defendant's conduct? And to
24 answer that question there are two categories of information
25 that we would need to know. We would need to know, first,

1 what these indirect purchasers bought and from whom and
2 because they have asserted state law claims from where, and
3 then we would also need to know -- we would need to see facts
4 that plausibly link the claim that they paid more for the
5 product that they purchased because of the defendants'
6 conduct, and none of that information is in either of these
7 complaints.

8 First, who bought what? The auto dealers appear to
9 allege that they bought both wire harnesses and related
10 products and also cars. The end payors don't differentiate
11 really, they just say they bought wire harnesses and related
12 parts so they don't say whether they bought them as
13 stand-alone parts in the aftermarket or whether they just
14 bought just cars that had wire harnesses in them.

15 With respect to the replacement part allegation,
16 there is not a single factual allegation in either complaint
17 about the aftermarket for any of these parts, not a single
18 allegation. There is nothing about conduct relating to the
19 aftermarket, there is nothing about how the RFQs specific
20 conduct that the pleas describe and that their complaint
21 describes relates at all to prices in the aftermarket or
22 anything about how pricing works in the aftermarket at all,
23 so they have not plausibly alleged that either any defendant
24 conspired with respect to any product in the aftermarket or
25 that these plaintiffs that they were harmed by any such

1 conduct, it is just not there.

2 So we will turn to the allegation about cars, the
3 purchases of cars.

4 THE COURT: But would it be plausible that they
5 would in the aftermarket sell for less than what they -- the
6 price they charged the OEMs?

7 MS. SULLIVAN: Well, Your Honor, I think there are
8 so many things that would go into how prices are charged in
9 the aftermarket that we can't conclude that one way or
10 another. It is possible that they might charge prices that
11 are related to the prices that they charged the OEMs, but it
12 also might be possible that they would charge significantly
13 higher prices because remember how this works, what they
14 allege in their complaint is that wire harnesses are
15 especially designed for a particular car model, and once a
16 supplier -- or once an OEM chooses a supplier, that supplier
17 has the business for the entire life of the vehicle, so for a
18 four- to six-year contract for the vehicle. So if there are
19 replacement parts that need to be made for that vehicle there
20 is a single OEM or a single wire harness manufacturer that
21 produces those replacement parts. There is no competition at
22 that point, they are a sole supplier to the OEM for that
23 model, and so it is plausible or possible that the prices
24 that are charged in the aftermarket are higher for a
25 completely unrelated reason and not tied at all to the prices

1 charged to OEMs.

2 So turning to the claim that they've paid more for
3 their cars, they don't allege what make or models they bought
4 and that information here is really important because of the
5 guilty pleas that they rely so heavily on. If you will just
6 go a couple of slides ahead, I'm jumping a little bit out of
7 order here, but we have a slide that is page 4 that is titled
8 guilty pleas do not support the broad conspiracy IPPs allege.
9 This is very similar to the slide that Mr. Cooper used
10 yesterday, but I have highlighted a couple of the pieces of
11 information from the pleas that are particularly relevant to
12 the indirect purchasers, and that's in -- if you look at the
13 target column you can see that several of the defendants pled
14 guilty to targeting an automotive manufacturer. And then if
15 you look at the individuals who pled guilty you can see that
16 the sales departments that they worked in were Honda, Toyota
17 and Subaru.

18 So we don't know which cars the plaintiffs bought
19 here so it is not plausible that a person who bought let's
20 say a Chevy was necessarily impacted by any of the
21 defendants' behavior that they pled guilty to. It may be
22 possible, again, but it is not plausible. They haven't
23 alleged what they bought and from whom so it is impossible to
24 reasonably infer that they, in fact, were injured.

25 And then the second piece of information that I

1 mentioned that we would need to see in the complaints for
2 these injury claims to make sense are facts that link the
3 defendants' conduct to the prices that these plaintiffs paid,
4 and that brings me to standing. Your Honor, any claimant can
5 conjure a damage claim for any possible injury that could
6 conceivably be traced to unlawful conduct however remote and
7 however speculative, but there are limits to who can actually
8 maintain these claims. Both Article 3 and the antitrust laws
9 require a causal connection between the defendants' alleged
10 conduct and the injury, and there is zero connection here.
11 Again, as I noted, because these are indirect purchasers they
12 are a couple steps removed -- several steps removed depending
13 on who they purchased from and what they purchased from the
14 wire harness manufacturers and so they have to establish that
15 causal connection, it is particularly important for these
16 plaintiffs' claims.

17 So, again, I would like you to -- I would ask you
18 to look at the replacement part purchases first and then
19 we'll turn to the cars because the analysis is slightly
20 different but the result is the same. In either case they
21 haven't plausibly alleged they were injured because of the
22 defendants' conduct.

23 Regarding replacement parts, as I noted, they
24 haven't alleged what they bought but even if they all bought
25 replacement parts they haven't alleged facts that plausibly

1 suggest that the injury is traceable to defendants' conduct.
2 They have to allege each of these elements of standing in the
3 same manner as any other matter on which the plaintiff bears
4 the burden of proof and with the manner and degree of
5 evidence required at the successive stages of the pleading.
6 That's the standard in Lujan. And, of course, Twombly says
7 you have to allege enough facts to state a claim for relief
8 that is plausible on its face. You have to read those two
9 opinions together, which is what the Sixth Circuit did in
10 Brown v. Matauszak, and Judge Borman just recently did in
11 Packaged Ice when he was analyzing whether plaintiffs had
12 established Article 3 standing, and he said there was simply
13 not enough factual matter asserted regarding injury that was
14 allegedly suffered, in that case it was limited to the
15 particular states, but he said to plausibly suggest a viable
16 claim.

17 And to the extent that the Court has any concern
18 that this is the proper standard to apply, the First Circuit,
19 the Eighth Circuit, the Ninth Circuit and district courts in
20 the Third, Fourth, Fifth and Sixth Circuits have all adopted
21 this standard, this higher pleading standard, to establish
22 the elements of article 2 since Twombly.

23 Now, as I noted, these plaintiffs complain about
24 price fixing at the initial RFQ stage when an OEM requests a
25 quote from a wire harness manufacturer and the wire harness

1 is designed for a particular car model. Because there are no
2 allegations at all about how prices submitted to that OEM
3 then relate at all to the aftermarket they easily fail to
4 establish Article 3 standing for the aftermarket claims.

5 So, again, now turning back to the claim that they
6 paid more for cars, there are two sets of indirect purchasers
7 and they are situated somewhat differently and I will get to
8 the difference, but before I do that I want to talk about the
9 similarity, which is the allegation that they paid more for
10 cars because the defendants fixed prices on wire harnesses.
11 Neither complaint alleges any facts that enables this Court
12 to reasonably infer that there was a causal link between any
13 defendant's conduct on wire harnesses and the prices the
14 plaintiffs paid for cars, and that conclusion is not
15 plausible given the products that we are talking about here.

16 As Your Honor noted during one of our earlier
17 status conferences, a car contains ten more -- more than
18 10,000 components, I think you said maybe 13,000 components,
19 and plaintiffs don't address that at all, they don't address
20 the engine or the chassis or the transmission or how any of
21 those other components might relate to the cost of a car or
22 how a wire harness or an ECU or a connector or any of the --

23 THE COURT: We have no information as I have been
24 looking for from the beginning and there is nothing in the
25 complaint about the cost of wire harnesses or even the

1 percentage in relationship to other parts. You know, it is
2 major? Is it more than an engine? I don't assume so but
3 whatever, there is nothing like that.

4 MS. SULLIVAN: That's correct, Your Honor, and
5 that's critical, that's critical here because the auto
6 dealers know exactly how much these things cost, right, and
7 the individuals to the extent that the end payors actually
8 bought replacement parts they know how much these things
9 cost, but none of that is in the complaint.

10 THE COURT: Well, the plaintiff wouldn't know how
11 much these things cost.

12 MS. SULLIVAN: Well, he or she would know how much
13 he or she paid if the person bought a replacement part.

14 THE COURT: Well, replacement part might be more,
15 they would know what they paid but they would only know what
16 they paid for that part as opposed to in relationship to
17 other parts in the car.

18 MS. SULLIVAN: That's correct.

19 THE COURT: An individual car purchaser doesn't
20 know how much the wire harness accounts for the cost of the
21 car.

22 MS. SULLIVAN: That's correct but you would get
23 some sense of the relationship -- for example, if you learned
24 or if there was an allegation that a person bought an ECU and
25 an ECU cost \$50 that gives you some indication of the

1 relationship between the cost of an ECU and the cost of a
2 car. Now, of course, the specific manufacturing cost but you
3 get a general sense of what the relationship is, and here
4 there is zero, there is nothing about that and that's
5 important because the only allegation that they have that
6 ties the wire harness prices to the prices they paid arguably
7 is that the wire harness can be physically traced, the actual
8 product itself can be physically traced through the chain of
9 distribution, and they conclude from that that the cost of
10 the wire harness can also be physically traced but that's not
11 plausible. There is -- without more, that is not plausible
12 without more. The ability to trace a physical product is
13 entirely different from tracing an overcharge on the product.
14 It would only be plausible if, as Your Honor noted, there
15 were some allegations that indicated that the cost of the
16 component was a significant portion of the cost of the end
17 product, and actually that is the trend in these kind of
18 cases.

19 Your Honor, we have read every single indirect
20 purchaser case that exists and we have tried to synthesize
21 them and understand what is going on in these cases. And if
22 you will turn to slide two in the little packet there is a
23 slide that has green and red, I call this the spectrum slide.
24 The title is no standing when component cost is small portion
25 of end product cost. And what this slide shows is that as a

1 general matter, particularly over the past four years since
2 Twombly and Iqbal, courts find standing when a component is a
3 significant portion of the cost of the end product but not
4 when it is an insignificant portion of the cost or when there
5 are no allegations at all as we have in this case.

6 I won't go through every single one of these cases
7 but I did want to highlight a few of them. On the standing
8 portion of it, Flash, the NAND Flash Memory case, LCD and GPU
9 are all very similar cases. In all three the component was
10 alleged to be a substantial amount of the cost of the end
11 product. And in Flash, in fact, the plaintiffs limited their
12 claims to products in which NAND Flash Memory was a
13 substantial component, for example, flash memory cards and
14 USB flash drives. They didn't even include other products.

15 In GPU the court was swayed by the fact that when a
16 consumer is buying a computer it buys the computer in part
17 based on the specific characteristic of the GPU, whether it
18 is a fast GPU or a slow GPU or other types of performance
19 characteristics, and also a GPU is a separate line item on a
20 computer invoice and, of course, a significant cost component
21 in a computer's price.

22 If you go down to the other end of the spectrum, I
23 want to highlight a couple. Magnesium is on there twice
24 because in the first decision there were no cost allegations
25 at all as we have in this case, and the court held that it

1 couldn't determine whether there was a sufficient nexus
2 between the defendant's alleged conduct and the plaintiff's
3 alleged injury. The court noted that trace amounts of an
4 ingredient in an end product would not have a foreseeable
5 effect on the price of the end product but a major ingredient
6 might, and so the court allowed the plaintiffs to amend their
7 complaint, and they did, and in their amended complaint they
8 stated that they bought cattle feed and mineral packs and
9 that magnesium was four percent of those products. The court
10 held in the second Magnesium decision that that wasn't
11 enough, that it wasn't foreseeable that purchasers of cattle
12 feed or mineral packs that only contain four percent of
13 magnesium would be injured by a conspiracy to fix the price
14 of the Magnesium.

15 Another one to highlight on this slide is the
16 Insulation case, that's the Von Der Werth v. John Manville
17 case out of the Northern District of Georgia (sic). In that
18 case Judge Carnes held that purchasers of homes did not have
19 standing to sue for price fixing on insulation. She noted
20 that they did not participate in the insulation market, that
21 there were no allegations that insulation was an integral
22 component of a home or a selling point of a home, and that
23 houses contain lots of other components that all have an
24 impact on the price that a person pays for a home and so the
25 allegation was too indirect. That's exactly what we have

1 here, Your Honor.

2 Now the plaintiffs I'm sure will come up and they
3 will refer to some cases in which courts did find standing
4 based on the types of conclusory boilerplate allegations that
5 they have here but all of those cases were before Twombly
6 with the exception of one, and that's the Intel case, but the
7 Intel case was decided after Twombly but before Iqbal, and
8 the court in the Intel case relied on or used the old Iqbal
9 standard so the court said we are going to use the Second
10 Circuit's flexible plausibility standard and not pay so much
11 attention to this new Twombly decision that has just come
12 out. And so then the Supreme Court ruled in Iqbal that that
13 was not the proper standard to apply and that the Twombly
14 standard was what the court needed to apply in all civil
15 cases.

16 Because neither group of plaintiffs here allege
17 anything at all about the relationship between a wire harness
18 price or a component -- I'm sorry, a connector or an ECU or a
19 junction box or a fuse box or any of the products that they
20 are basing their claims on, any relationship between those
21 products and the price they pay for their cars they have
22 failed to establish Article 3 and antitrust standing.

23 And then the end payors have two additional
24 fundamental problems with their claims. First, they are at
25 the very bottom of the distribution chain here and they don't

1 allege that any party above them actually passed on any
2 overcharge or any portion of any overcharge that it may have
3 paid, and they can't do that because the auto dealers who are
4 above them in the chain of distribution claim that they
5 absorbed a significant portion of any overcharge that they
6 might have paid. That's in paragraph 214 of the auto
7 dealers' complaint and 215 of their complaint. They
8 expressly state they did not pass on all of the overcharges.

9 Now, of course, as I have explained, the dealers
10 themselves don't allege sufficient facts to support their
11 claim that they had to pay an overcharge but even if they had
12 they say that they didn't pass it all through. Did they pass
13 any of it through? The end payors don't say, they don't make
14 that allegation.

15 But even if an auto dealer did take some portion of
16 an overcharge into account when it set a sticker price for a
17 car, the second fundamental problem that the end payors have
18 with their claims is that the price that people, you and I
19 when we buy a car, it is negotiated, that price is
20 negotiated. Two people who go into the same dealer on the
21 same day and buy the same car pay different prices, and those
22 negotiations are impacted by things like whether you have a
23 trade-in, if you have a trade-in what's the value of your
24 trade-in, are there rebates being offered or special
25 discounts, is there a rebate being offered across the street

1 that might be better that you use to bargain for a better
2 price? Are there cash incentives or reduced financing rates
3 or free upgrades? It just is not plausible based on the
4 facts that these plaintiffs have alleged that the prices the
5 end payors paid were affected in any way by the defendants'
6 conduct.

7 Now, it is important to understand that these
8 deficiencies, everything I have just been talking about, they
9 are fatal regardless of whether Associated General
10 Contractors applies to the standing claims here -- or to the
11 state law claims here. There are four ways that courts
12 approach the antitrust standing analysis. One, they apply
13 the AGC five-factor test. Two, they use ACG as a guide and
14 they don't necessarily apply the factors stringently but they
15 use ACG as a guide. Three, they apply a modified version of
16 AGC which might use three of the factors or four of the
17 factors. And four, some courts don't apply AGC at all but
18 they look to common law concepts of foreseeability, proximate
19 cause, remoteness and the relationship between the injury and
20 the purpose of the antitrust laws. All four of these
21 approaches take causation and the remoteness of the injury
22 into account. These concepts are fundamental to antitrust
23 standing because the antitrust laws weren't designed to allow
24 anyone who could conceivably come up with a claim to pursue
25 it and then recover treble damages. The antitrust injury

1 requirement imposes limits on who can bring claims under both
2 state and federal law. So for all of these reasons,
3 whichever approach Your Honor decides to take here, the
4 component part purchases, the indirect purchasers who bought
5 cars, do not have standing.

6 I would like to shift gears a little bit now and
7 talk about standing to assert claims in states for which they
8 are not residents.

9 THE COURT: All right.

10 MS. SULLIVAN: Judge Borman's decision in Packaged
11 Ice and Judge Cox's recent decision in Refrigerant
12 Compressors are both thoughtful and well-reasoned opinions on
13 this issue and so I would encourage the Court to apply the
14 same reasoning here. The states that are at issue for the
15 auto dealers are Hawaii, Maine, Montana, North Dakota,
16 South Carolina and Vermont; and for the end payors,
17 Washington, D.C.

18 South Carolina and Vermont require explicitly that
19 the residents of those states be affected by the alleged
20 conduct. Vermont doesn't state that explicitly in its
21 statute but the Supreme Court of Vermont has held that the
22 legislative history of this statute makes clear that the
23 statute was enacted to protect Vermont's citizens but there
24 are no allegations at all that suggest that any residents of
25 any of those three states were affected here.

1 For the other states the point here is not really
2 that they don't have any residents who are named plaintiffs
3 but that they haven't alleged any facts at all that link
4 their alleged injuries to the state's cause of action. All
5 of those states require that the effect be felt in the state.
6 As the plaintiffs point out, they provide a claim for any
7 person, that's true, but it is any person who was injured by
8 the conduct made unlawful by the statute, and the conduct
9 that each statute prohibits must have some connection to the
10 state. Hawaii, Maine and Washington, D.C. all have the same
11 language; a contract, combination or conspiracy between two
12 or more persons in restraint of or to monopolize trade or
13 commerce, any part of which is in this state, is unlawful.

14 THE COURT: So if they bought their car in that
15 state wouldn't they have the effect -- if what plaintiff says
16 is true the effect in that state?

17 MS. SULLIVAN: They would but they haven't alleged
18 that. They haven't alleged where they bought anything so we
19 have no idea. The key is that they, as you pointed out, they
20 don't necessarily have to reside in the states but they do
21 have to allege some connection and they haven't. They make
22 these conclusory allegations that the defendants' conduct was
23 directed at wire harnesses -- I'm sorry, at the wire harness
24 market in all states and had an effect throughout all of the
25 states, and those claims aren't enough. Judge Borman

1 recently found in Packaged Ice that similar types of
2 conclusory allegations did not establish Article 3 standing
3 to sue under state law when you didn't have some real
4 connection, some factual allegations that drew a connection
5 to the state.

6 The end payors' claim regarding D.C., they allege
7 that price competition in Washington, D.C. was restrained and
8 that the prices for wire harnesses were raised in D.C., but
9 they actually don't allege that any named plaintiff purchased
10 wire harnesses or any product in D.C. at artificially high
11 prices. So, again, the same reason they haven't alleged any
12 connection at all to Washington, D.C.

13 I anticipate that the plaintiffs will get up here
14 and they will say, Your Honor, you don't need to decide this
15 issue now because these are really class questions and so
16 just push it off until class certification. There is a split
17 in the circuits on this question of whether you can push off
18 the question of Article 3 standing for these -- on these
19 state claims until after class certification. The
20 Sixth Circuit has not ruled the way plaintiffs assert that
21 they have.

22 In the Sixth Circuit in the Fallick case the court
23 specifically stated that the threshold individual standing is
24 a prerequisite for all actions including cost actions, and
25 that a potential class representative must demonstrate

1 individual standing vis-à-vis the defendant. He cannot
2 acquire such standing merely by virtue of bringing a class
3 action. That's at page 423 of that decision.

4 In that case once the plaintiff had established
5 that he had standing to bring each of his claims then the
6 court said you don't need to look to see if he has standing
7 then to assert claims on behalf of class members, but here
8 the point is that these plaintiffs have not established that
9 they have standing to assert the state law claims that they
10 are asserting. They have to establish standing for every
11 single claim and they haven't done that.

12 Then finally just a brief note about injunctive
13 relief. They haven't established standing to bring their
14 injunctive relief claim for two reasons. First, really for
15 the same reasons that their damages claim fails, that they
16 haven't established antitrust injury, they can't get an
17 injunction against a threatened injury for which they
18 wouldn't be able to entity -- or they wouldn't be able to
19 recover compensation if the injury had actually occurred.
20 And then second, they don't allege any facts to plausibly
21 suggest that there is any future threat of injury here. As
22 we have talked about for the past two days, the
23 investigations that generated all of this began in February
24 of 2010, and there are a number of guilty pleas and there is
25 just no allegation at all that plausibly suggest that in the

1 face of Government investigations and with guilty pleas out
2 there that any of these defendants are continuing to engage
3 in any kind of unlawful conduct.

4 THE COURT: Okay.

5 MS. SULLIVAN: Thank you.

6 THE COURT: Thank you.

7 MS. FISCHER: Good morning, Your Honor.

8 Michelle Fischer from Jones Day on behalf of the defendants
9 for the remaining state law arguments.

10 THE COURT: All right.

11 MS. FISCHER: Plaintiffs have alleged --

12 THE COURT: I have to say that this is the first
13 time I have dealt with all of these different state laws.
14 They are absolutely mind boggling.

15 MS. FISCHER: Yes, they are.

16 THE COURT: I thought they were going to be able to
17 be categorized in certain -- I was just --

18 MS. FISCHER: My colleagues told me I drew the
19 short straw.

20 Plaintiffs have raised antitrust claims under the
21 laws of 25 states, consumer protection claims under the laws
22 of 14 states, and unjust enrichment claims in 32 states.
23 Each of these state laws has specific elements and pleading
24 requirements, and plaintiffs' complaints fall far short of
25 many of them for the reasons that we detailed in our briefs

1 and that we briefly summarize on page 5 of the handout that
2 you have in front of you from Ms. Sullivan.

3 Although the other brief discusses these numerous
4 deficiencies in great detail, in the limited time I have
5 today I would like to highlight a few of the deficiencies in
6 their complaint and in their claims to show you why those
7 claims fail and why they cannot be fixed.

8 I would like to turn first to the auto dealers'
9 lack of standing to bring consumer protection claims in three
10 states; Missouri, Montana and Massachusetts. The consumer
11 protection laws in Missouri and Montana clearly permit only
12 persons or consumers who purchased or leased goods, quote,
13 primarily for personal, family or household purposes to bring
14 a claim. Auto dealers expressly plead in paragraphs 50 to 51
15 and 68 to 69 that they bought wire harnesses and the other
16 products for, quote, their repair and service businesses.

17 They cite not a single Missouri or Montana case
18 even suggesting that businesses like them who made their
19 purchases for commercial purposes have a right to bring
20 claims under these statutes and, in fact, even the inapposite
21 cases that they cite construing Michigan law make clear
22 that -- make clear and they cite them through frankly
23 creative and truncated quotation that those -- they make
24 clear that there is a distinction between persons who buy
25 goods as true intermediaries or conduits who buy them purely

1 to pass them along for somebody else's personal use from
2 those who, like auto dealers buy the goods, quote,
3 principally so that they can themselves engage in their own
4 business or commercial enterprise. Auto dealers are
5 businesses, they have no standing, they cannot fix that on
6 amendment.

7 Now, the situation is similar in Massachusetts. As
8 businesses auto dealers must bring their claims under section
9 11 of the Massachusetts consumer protection law. Section 11
10 expressly states that it must be construed consistently with
11 Massachusetts Antitrust Act. That act denies indirect
12 purchasers a right of action. They don't dispute that they
13 can't bring a claim under the Massachusetts Antitrust Act and
14 significantly they do not allege, either end payors or auto
15 dealers, they do not allege a claim under the Massachusetts
16 Antitrust Act. And once again, even the case on which they
17 seek to rely, Ciardi vs. Hoffmann-LaRoche, makes clear that
18 claims under section 11 are to be guided by interpretation of
19 the Massachusetts Antitrust Act, quote, and by association
20 Illinois Brick. They are indirect purchasers, they have no
21 standing under section 11, they can't fix that on amendment.
22 Their claims should be dismissed.

23 Next I want to turn to their class action claims
24 again under three laws, under the Illinois Antitrust Act and
25 the consumer protection laws of Montana and South Carolina.

1 Auto dealers bring claims under all three. End payors bring
2 claims only under Montana law.

3 As you can see from the left-hand column of page 6
4 of your handout --

5 THE COURT: Wait a minute.

6 MS. FISCHER: -- each of these states' laws contain
7 an express ban on class actions.

8 Now plaintiffs argue that the Supreme Court's
9 decision in Shady Grove somehow changes this. It absolutely
10 does not. Shady Grove is not a blanket ban on enforcing
11 class action bars in diversity actions. Rather, Shady Grove
12 says that a state procedural rule as opposed to say a rule
13 that might be procedural in title but substantive in
14 application would be displaced by federal procedural rules in
15 diversity actions. But where, however, a state procedural
16 rule is, quote, so intertwined with a state right or remedy
17 that it functions to define the scope of the state-created
18 right the state rule will continue to govern. In other
19 words, as this court found in Packaged Ice and as many other
20 courts both within this circuit and in others have found,
21 statutory restrictions on class actions which appear in the
22 very statutes that define the substantive rights at issue
23 survive Shady Grove.

24 So as you can see from this slide, unlike the
25 New York statute at issue in Shady Grove, which is shown in

1 the right-hand column, that is exactly what the statutes at
2 issue here do, they define and limit the rights within the
3 very same statute. In New York there was a separate
4 procedural statute and a substantive statute, and the
5 procedural bar, the class action bar, applied to many, many
6 different causes of action. Here the class action bar
7 applies only to an antitrust cause of action or a consumer
8 protection cause of action. For that reason courts faced
9 with this very issue on motions to dismiss have specifically
10 found that the Illinois antitrust class action bar and others
11 like it survive Shady Grove and have therefore dismissed
12 class action claims as being statutory barred.

13 In Re: Wellbutrin and In Re: Digital Music, both
14 specifically found that the Illinois act class action bar
15 survived, and this court in Packaged Ice, although dismissing
16 the Montana claim on other grounds, did say that after
17 Shady Grove class actions would likely continue to be -- to
18 be barred in federal court under the Montana Unfair Trade
19 Practices Act.

20 The South Carolina statute, as you can see, is of
21 exactly the same nature and the same exact argument applies
22 to South Carolina. All of these claims are statutory barred
23 and they cannot be fixed on amendment.

24 Now I would like to turn globally to the
25 plaintiffs' unjust enrichment claims. Plaintiffs conceded in

1 their opposition that their unjust enrichment claims are
2 based on the same facts as their underlying state antitrust
3 claim. In so doing they clarified and conceded they are not
4 seeking to bring what are called autonomous or freestanding
5 unjust enrichment claims, those are claims that exist
6 independent of an underlying act. Instead, plaintiffs have
7 brought here what are called parasitic unjust enrichment
8 claims. These are claims that merely provide an alternative
9 form of remedy for the plaintiffs' underlying predicate act,
10 in this case either an antitrust claim or a consumer
11 protection claim or both in a given state. That means that
12 their unjust enrichment claims rise or fall with the
13 underlying antitrust or consumer protection claims to which
14 they are tethered in the first instance. That's the first
15 in Creek.

16 What that means as well though is that if this
17 Court finds that there is, for example, only an antitrust in
18 a given state and that that claim fails for the reasons that
19 either Ms. Sullivan or state-specific reasons discussed in
20 our briefs, you don't even have to get to an unjust
21 enrichment analysis because if the underlying claim fails so
22 too does the unjust enrichment claim because they are
23 parasitic. But even assuming that a given state the
24 underlying claim or claims survive, the unjust enrichment
25 claim may well be deficient in its own right, and the vast

1 majority of plaintiffs' unjust enrichment claims are. They
2 have made no effort whatsoever to tailor their claim to any
3 specific state. Instead they make this omnibus claim that
4 the defendants' conduct has violated the unjust enrichment
5 claims -- the unjust enrichment laws in 32 states. That
6 approach dooms their unjust enrichment claim in virtually
7 every state, not every state but virtually every state in
8 which they bring them, at least under a proper unjust
9 enrichment claims analysis.

10 We've laid out the unjust enrichment analysis on
11 the next page of your handout. This is the analysis that
12 defendants argue applied as opposed to the
13 mischaracterizations we feel of our arguments you will see in
14 the plaintiffs' opposition.

15 So I would like to go through what the proper
16 analysis really is. Specifically, the analysis starts by
17 asking for each state under which plaintiffs assert an unjust
18 enrichment claim under what underlying state law or laws did
19 they assert the claim; antitrust only, consumer protection
20 only, or both?

21 So let's use Massachusetts as an example. In
22 Massachusetts end payors have abandoned their Massachusetts
23 antitrust claims so now we are left with both end payors and
24 auto dealers have only a Massachusetts consumer protection
25 claim. So at step two we ask, do they have standing to

1 assert their claims under that law? As we just discussed,
2 because auto dealers are businesses they have to bring their
3 claims under section 11 of Massachusetts law, they lack
4 standing, so at level three of the flow chart their consumer
5 protection falls, unjust enrichment analysis ends for auto
6 dealers, they are done because their underlying claim fails.

7 But the end payors sue under section 9 and indirect
8 purchasers are allowed to proceed under section 9 of
9 Massachusetts consumer protection law. So we then ask --
10 then we go to the next stage and we ask, does their consumer
11 protection claim fail for other reasons? Well, as
12 Ms. Sullivan told you earlier today, we believe they fail
13 because they haven't alleged injury and fact, and that the
14 claim goes out for that reason. If the Court accepts that
15 then there is no unjust enrichment analysis, their unjust
16 enrichment claim fails. If the Court doesn't accept that,
17 then we go to the next step and we ask is the unjust
18 enrichment claim barred for other reasons.

19 Now, as we explained in our briefs, there are three
20 primary additional reasons why plaintiffs' unjust enrichment
21 claims could fail. First, where the plaintiffs received the
22 benefit of the bargain they have no viable unjust enrichment
23 claim. This applies to 24 states including Massachusetts.

24 Next, where the defendants have failed to confer a
25 benefit directly on the defendants. They have no viable

1 unjust enrichment claim in seven states. That is not the
2 rule in Massachusetts.

3 And third, where plaintiffs fail to meet special
4 pleading requirements that apply in seven states, not
5 including Massachusetts, they also have failed to allege a
6 viable unjust enrichment claim.

7 So to finish our Massachusetts example let's start
8 first with benefit of the bargain. As you can see from
9 page 8 of your handout, plaintiffs have brought unjust
10 enrichment claims in 32 total states. If you turn to the
11 very next page you can see that courts in 24 of these states,
12 including Massachusetts, have recognized that where the
13 plaintiff gets the exchange he expected -- what do I mean by
14 that? The product he intended at the price he agreed to --
15 then there is, quote, no equitable reason for restitution.
16 For that reason, courts in these 24 states have routinely
17 rejected unjust enrichment claims in cases where, as here,
18 parties have voluntarily negotiated and entered into and
19 fully performed their bargain. Plaintiffs do not allege that
20 they did not get the products that they expected. They got
21 their cars and they paid for them at the prices they agreed
22 to. Their claim is not that they didn't get what they wanted
23 but that they paid too much for it. That is their claim.
24 And as our briefs make very clear, the cases are clear that
25 where they got what they wanted and merely paid too much,

1 that does not state a viable unjust enrichment claim.

2 I will refer as examples to the Prohias case and
3 the District 1199P cases. In each of those cases the
4 plaintiffs were purchasers of drugs from pharmacies, and they
5 allege that the defendant drug manufacturers had engaged in a
6 scheme to basically mislabel through off-label marketing or
7 bad advertising to create artificial demand for their product
8 which ended up increasing the price of those products. The
9 plaintiffs claim therefore that by purchasing the drugs for
10 which the prices had been artificially increased they had
11 unjustly enriched the defendants.

12 In each of those cases the court looked to the fact
13 that the plaintiffs got exactly what they bargained for, a
14 drug that worked for the condition for which it was purchased
15 at the price that they had agreed to pay, and held that the
16 drug manufacturers were not unjustly enriched by the higher
17 prices.

18 THE COURT: Was that contract law or antitrust law?

19 MS. FISCHER: They were marketing cases so I think
20 they were probably unfair competition type claims, but I can
21 get that for you, I don't have that off the top of my head.
22 It was not a contract.

23 THE COURT: It just seems that you would agree to
24 pay X dollars if that was the going rate for the product, but
25 if the product should have been X minus Y you wouldn't have

1 paid more for it.

2 MS. FISCHER: I guess what I would say, Your Honor,
3 is if there is an actual contract unjust enrichment doesn't
4 even apply, contract law would then govern in that particular
5 case.

6 THE COURT: Right.

7 MS. FISCHER: So what we are looking at here is
8 whether or not there was an unjust enrichment to the
9 defendant, and under circumstance where the plaintiffs
10 pleaded that their injury was that they paid too high of a
11 price that was not -- that was not deemed to be a viable
12 unjust enrichment claim. But let's look at it from the
13 perspective that you just noted. Let's say the plaintiff
14 argued that, in fact, it didn't get the benefit of its
15 bargain, okay, because it felt it should have gotten
16 something else perhaps at a lower price. Well, even assuming
17 that's the case where the plaintiffs allege they didn't get
18 the benefit of the bargain, which I want to point out
19 plaintiffs do not make that allegation here, the courts do
20 not automatically conclude that there is a viable unjust
21 enrichment claim or that the defendant was unjustly enriched.
22 Instead, they will then look to assess the defendant's
23 bargain, they will look to see whether the defendant received
24 a benefit from someone and if so whether the defendant paid
25 someone for it. And they have concluded that, this is a

1 quote, the retention of a benefit is not unjust where
2 defendants have paid for it. If the defendant has given any
3 consideration to any person for the benefit it would not be
4 unjust for him to retain the benefit without paying the
5 furnisher. That comes from Ray Riley's Tire Mart, that's a
6 Vermont case, quoting a Tennessee Supreme Court case called
7 Paschalls v. Dozier.

8 Another case that looks to whether or not the
9 defendant has paid for -- paid consideration for what it
10 received from whoever provided the benefit directly to it is
11 American Safety. Here the defendants gave consideration,
12 wire harnesses, connectors, fuse boxes, et cetera, to their
13 direct customers, and plaintiffs do not and cannot plead
14 otherwise, nor did they plead that they didn't get their
15 benefit of the bargain. Their only real retort is to make
16 two claims. First is to say that section 107 of the first
17 restatement of restitution, which is a source of this benefit
18 of the bargain rule, does not apply anymore. Well, that's
19 readily rebutted by the fact that that section continues to
20 be cited and relied upon, and the rule is that issuances of
21 new restatements do not automatically supersede earlier
22 restatements.

23 And second, they claim that the benefit of the
24 bargain analysis only applies when the bargain at issue was
25 between the actual parties to the litigation before the

1 court. They cite zero cases in support of that. By contrast
2 you will find in defendants' papers at least nine cases where
3 the benefit of the bargain analysis was applied by the court
4 even though the bargain they were assessing was not between
5 the parties to the litigation. These include the cases I
6 just referred to, Ray Riley's, Prohias, District 1199P and
7 American Safety, and at least five others which I'm happy to
8 list for you but in the interest of time I will move on.
9 They are all in our papers.

10 Basically bottom line, plaintiffs have offered
11 nothing that undermines the fact that these 24 jurisdictions
12 apply the benefit of the bargain analysis irrespective of
13 whether the bargain was between the parties before the court,
14 and will bar unjust enrichment claims where the plaintiffs
15 got what they expected at the price they negotiated, or if
16 they didn't where, in fact, the defendant has paid
17 consideration for the benefit it received.

18 Now that takes care of benefit of the bargain, but
19 if you turn to page 10 of your handout, you can see that
20 plaintiffs' unjust enrichment claims fail in seven states for
21 the additional reason that plaintiffs have failed to allege
22 that they directly conferred a benefit on the defendants, and
23 that's required in these seven states. Here, again,
24 plaintiffs do not argue that they met this requirement but
25 instead they claim that we are wrongly insisting upon direct

1 contact or contractual privity in these states.

2 I want to be very clear, that is not the
3 defendants' argument, we are not insisting on either privity
4 or direct contact. Instead, we are insisting that they show
5 that they, in fact, conferred a benefit directly on the
6 defendants. Two ways to do this are, of course, through
7 direct contact or through contractual privity but they are
8 not the only ways as the case law shows. One way, for
9 example, where a plaintiff can confer a direct benefit
10 without either privity or contact is where it provides
11 services, let's say such as medical services to a person to
12 whom the defendant owes a duty such as a duty of care.

13 Examples you will find in the case law include the
14 provision of medical services, let's say to a minor child to
15 whom a defendant parent or guardian owed a legal duty of
16 care, or medical services to county or city or state inmates
17 to whom the county or city owed a duty of care. In each case
18 the medical services are provided, they are not paid, and the
19 provider goes after the defendant who had the legal duty.
20 That, of course, doesn't apply here.

21 Another example is where a plaintiff contractor
22 makes improvement to a defendant's property at the request of
23 a lessee. When the lessee fails to pay but the landowner
24 retains the improvements and is then able to rent out its
25 property for a higher rate because of the improvements, the

1 landowner has been viewed as unjustly enriched even though
2 there was no privity and frankly no communication as between
3 the landowner and the contractor but the benefit was directly
4 conferred on the landowner's property.

5 In each case, as I just said, no direct contact, no
6 contractual privity, but there was a direct benefit. That is
7 what we are asking plaintiffs to allege and they haven't done
8 so, and under the circumstances of this case we don't believe
9 there is any way any could do so. Their unjust enrichment
10 claims fail in these seven states because they do not and
11 cannot allege a direct benefit.

12 Finally, if you look to the next page of your
13 handout, you will see that there are special pleading
14 requirements imposed under the unjust enrichment laws of
15 seven states. They are basically summarized for you there.
16 I'm not going to go through all of them. I wanted to use
17 just one example. Let's take a look at Tennessee. The
18 Tennessee Supreme Court has made it very clear that to state
19 a viable unjust enrichment claim under Tennessee law you must
20 allege that you have exhausted your remedies against your
21 direct seller or that effort would have been futile, but it
22 is not enough just to say that the effort would have been
23 futile. The Tennessee Supreme Court has specifically said
24 that a bare allegation that any attempt to exhaust its
25 remedies against the direct seller would be futile without

1 providing a factual basis to support the allegation is not
2 sufficient.

3 Plaintiffs have not done so here. They say by
4 citing to a bunch of federal cases that they don't have to do
5 so here, but the Tennessee Supreme Court would be the arbiter
6 of how its own laws are supposed to be constructed, they are
7 not free to be ignored.

8 So if you go to the last slide you will see that
9 even if we start with the assumption, the wrong assumption,
10 that all of the underlying predicate claims survived after
11 application of the unjust enrichment analysis I went through,
12 you will end up with, at most, unjust enrichment claims in
13 five states.

14 Your Honor, in bringing their state law claims
15 plaintiffs basically took a throw spaghetti at the wall and
16 see what sticks approach. We submit the vast majority of
17 their claims do not stick and cannot stick even if you give
18 them another chance to take aim, and we would ask you to
19 dismiss them all.

20 THE COURT: Thank you.

21 MS. FISCHER: Thank you.

22 THE COURT: Response?

23 MR. CUNEO: Good afternoon, Your Honor. Jonathan
24 Cuneo; Cuneo, Gilbert & LaDuca. I'm appearing here on behalf
25 of the auto dealers. I have agreed to split our time with

1 Mr. Steve Williams of the Cotchett firm who will be
2 representing our customers, the end payors. I thought it
3 would be most helpful to the Court if I addressed some of the
4 gnarly antitrust questions that the defendants have raised.

5 Now, let's start with the question of standing.
6 That, of course, is a word that has many meanings but when we
7 talk about Article 3 standing then what that invokes is the
8 jurisdiction of the federal court.

9 Now, the Supreme Court has a recent and important
10 decision in that area, the Sprint case. And in that case the
11 high court upheld a claim in which the plaintiff had agreed
12 to assign 100 percent of the proceeds of the plaintiff's
13 claim to other parties. The plaintiff was effectively acting
14 as a collection agent and had no financial interest in the
15 outcome, and the court nonetheless upheld the claim.

16 But what is significant for this morning's
17 discussion is that the majority opinion stated that in
18 discussing the dissent that the agreement among the plaintiff
19 and his -- and its assignees could easily be jiggered to
20 provide a dollar or two of standing and that would be
21 sufficient. And that court very clearly upheld standing in
22 the face of an allegation that the plaintiffs hadn't suffered
23 at all. Subsequently, the 2011 Bond vs. United States case
24 differentiates between a situation in which the plaintiff
25 cannot state a claim of relief and one in which the court

1 lacks jurisdiction.

2 Now, our case is a case with respect to the auto
3 dealers where we have alleged monetary damage that we
4 absorbed time and time and time again in the complaint. And
5 in fact, one of my distinguished colleagues who appeared
6 before me quoted sections 215 and 216 in which she said that
7 we alleged that we had absorbed a tremendous amount of the
8 overcharges that had been passed on by the OEMs.

9 Now, let me say this, we are plaintiffs who
10 purchase both the automobile wire harness itself as well as
11 the wire harness when it is incorporated in a manufactured
12 vehicle by the OEMs. Now, the defendants -- and that is a
13 very important difference, and if you look at page 11 and
14 12 -- maybe it is 10 and 11, it is around in there, of their
15 opening brief, they seem to concede that we have standing and
16 meet the AGC factors, Associated General Contractors, which I
17 will turn to in a second, with respect to the purchase of
18 individual parts.

19 However, let me say this, we are directly in harm's
20 way. We purchase from the OEMs, that is in our complaint,
21 that's common sense, everybody knows it, and the vast
22 majority of dealers in the United States purchase directly
23 from OEMs. And if you listen to the defendants that this is
24 a conspiracy or a series of conspiracies to bid rig with
25 respect to OEM procurement needs, and when the OEMs purchase

1 that equipment from the defendants there is only one use that
2 they have for it and that is to put it in a car or else to
3 sell it to dealers. It is not like people -- and that charge
4 is directly reflected in the price that the OEMs charge us.
5 So we are not people that install the soda machines at
6 dealerships or even at OEMs, we are people who are directly
7 in the line of distribution.

8 Now let's talk about the two-percent figure that
9 the defendants -- it is not in the record and the defendants
10 put the two-percent figure in their brief. Now, two percent,
11 it is not a figure that we know or agree to or have had any
12 discovery about. However, I would take the position it makes
13 our case and here is why: A motor vehicle in the United
14 States costs over the class period on average between 24,000
15 and \$30,000, something like that. So what we are talking
16 about is an overcharge on an item that is between 500 and
17 \$600.

18 Now, in the chart that the defendants prepared
19 notice that they put on percentages, they didn't put on
20 dollar figures. That is a very large component and an
21 important component in the car. It is not like we are
22 talking about an ashtray, it is not like we are talking about
23 something that is irrelevant, it is central to the nervous
24 system of the car, you can't operate without one, and so we
25 are directly and really approximately affected.

1 To the extent that state legislatures around the
2 country overruled Illinois Brick, we were the people that
3 they had in mind. Now, we allege clearly, I want to state
4 this, in paragraph 12 that automobile dealers paid
5 artificially inflated prices for vehicles containing
6 automobile wire harness systems, and in paragraph 21 that
7 defendants' conspiracy adversely affected persons in the
8 United States who purchased automobile wire harness systems,
9 and in paragraph 229 super competitive prices.

10 Now let's talk for a second about Associated
11 General Contractors, that is a federal case decided after
12 Illinois Brick. And what that case involved was a lawsuit on
13 behalf of a union which was suing contractors saying that
14 they were trying to discourage union labor by agreements.
15 The case didn't involve higher prices or consumers or
16 anything like that. And Justice Stevens, who was a
17 distinguished antitrust lawyer, strives mightily to take the
18 complaint and the prior opinions and construct an antitrust
19 allegation. It was really constructed mostly in the Supreme
20 Court. And he noted that the harm was that a conviction of
21 coercion may have diverted particular contracts to nonunion
22 firms and thereby cause certainly unionized subcontractors to
23 lose some business. Well, that certainly doesn't sound
24 anything like our case. And he says that in that case the
25 union was neither a consumer nor a competitor in the market

1 that was restrained.

2 Well, we are surely purchasers of these products.
3 Now, trying to graft Associated General Contractors and
4 harmonize it with the state repealer statute is a challenging
5 prospect because state legislatures have authorized just this
6 kind of lawsuit. Under the defendants' construction of the
7 case no lawsuit like this of the law would ever be
8 authorized, and we say that even if AGC is applicable, it is
9 applicable in some states, maybe a few, others it is of
10 ambiguous applicability in an indirect purchaser case, and in
11 other cases it is not applicable at all. But even if we are
12 in this context -- in the special context, applicable, we
13 easily meet the standard, the nature of the harm, an
14 overcharge, direct -- it is about as direct as you can get
15 without being an OEM.

16 Speculative measure, well, since that time that was
17 decided the economic science has advanced tremendously and
18 people who were a lot smarter than me can do studies and
19 determine exactly who paid what overcharge. So complexity,
20 well, that is something that the courts -- that the
21 legislature has effectively passed to the courts. And there
22 are lots and lots of cases at different circumstances in
23 complex litigation where damages are apportioned and
24 courts -- it is part of the bread and butter of complex
25 litigation. I mean, for example, where there is a fund and

1 it is created and there's different sets of stockholders and
2 bondholders and 401(k) claimants to the same fund, courts
3 routinely in these circumstances deal with these problems,
4 and that, in my judgment, is a later problem; that has
5 nothing to do with whether this complaint as pled can be
6 upheld, but even if everything the defendants say is true,
7 which we don't agree, we think that the complaint should
8 easily be upheld.

9 Now, I would like to talk about a number of the
10 individual state issues and --

11 THE COURT: Not too great a number.

12 MR. CUNEO: I'm sorry?

13 THE COURT: Not too great a number.

14 MR. CUNEO: I'm going to limit it, okay, I'm going
15 to limit it very quickly. Let me say this, let's talk for a
16 second about the so-called Shady Grove issue. Okay. This is
17 a case in which courts have in the past incorrectly sometimes
18 dismissed some cases because of an incorporated class action
19 ban. Well, Mr. Cooper, who spoke yesterday, told this Court
20 that what the Court has now is a series of individual cases,
21 it is not yet certified as a class, and each dealer on behalf
22 of whom we have asserted a claim has a very valuable
23 individual claim well in excess of the statutory minimum as
24 well as a claim for injunctive relief, and so it would be
25 improper to dismiss a case on the ground that that dealer

1 couldn't maintain a class action. That is a procedural
2 problem that I really do think the Court can scratch off of
3 its list right now.

4 Okay. Let me quickly address the question of
5 component purchasers -- well, I already have addressed it a
6 little bit but the only two real cases that they cite, the
7 components were small, they had many uses, the vast majority
8 of weight is that purchasers of components can maintain a
9 suit under the Illinois Brick repealer acts.

10 Let me turn now to the Massachusetts example.
11 Section 11 of the Massachusetts law confers standing on
12 businesses to bring lawsuits such as this, but the provision
13 that the defendants rely on say that the courts shall be
14 guided in its interpretation of unfair methods of competition
15 by the principles of the Massachusetts antitrust law. Well,
16 antitrust is kind of a living, breathing thing, and there are
17 practices that existed in the '70s that were thought to be
18 illegal, for example, maximum vertical price fixing, but now
19 the Supreme Court says, well, maybe not. It is -- they use
20 to be per se, now it is rule of reason. It is a flexible
21 body of law.

22 Here what the directive is is to be guided in its
23 interpretation of an unfair method of competition, that --
24 whether one can bring suit isn't an interpretation of what an
25 unfair method of competition is, that's a substantive

1 provision.

2 Finally, let me say this, I'm looking over this
3 list the defendants have put together, the interstate
4 commerce issue, in every case we represent a substantial
5 dealer and dealers do millions of dollars worth of business,
6 they buy cars, they order cars, they pay for cars, they fix
7 them up for sale, they deal with customers, they help make
8 financing arrangements, many cases they have special
9 arrangements with the DMV, they repair people's cars. Any
10 suggestion that that isn't interstate commerce is not
11 correct, and that one I think is easy.

12 With respect to the consumer protection statutes of
13 Missouri and Montana, those statutes look at the nature of
14 the product, whether it is a consumer product or whether it
15 is not necessarily facts claimed for entities that are a lot
16 larger than us, meanwhile mainly major insurance companies
17 who are -- health insurers have been upheld under those
18 statutes.

19 Now, I think that that is the points that I wanted
20 to cover in my initial presentation, and I would, of course,
21 be prepared to answer any questions the Court might have.

22 THE COURT: Okay. Let's hear the rest of your
23 presentation of plaintiffs. Is it --

24 MR. WILLIAMS: The end payors.

25 THE COURT: I would like to get this done before I

1 let you go so if you have to leave just feel free. All
2 right. For the end payors?

3 MR. WILLIAMS: For the end payor, Steve Williams.
4 Thank you, Your Honor. I want to thank the Court and its
5 staff for the time and attention to all of this. There is a
6 lot of materials here, and we saved for the end the part that
7 is perhaps the most involved in terms of the number of laws
8 because Congress decided that all of the class actions ought
9 to go to federal judges, so federal judges now have the
10 pleasure of adjudicating what were state court claims.

11 But the important part of that is that in doing so
12 we need to look at what the state court law is. The
13 fundamental point here is that the defendants are really
14 asking this Court to do something that no other court has
15 done, many of their points are not supported, most of their
16 points are against the authorities because when the Supreme
17 Court -- the U.S. Supreme Court in Illinois Brick made a
18 prudential determination that an indirect purchaser should
19 not get to assert a claim for damages under the Sherman Act
20 and the Clayton Act, they weren't saying that indirect
21 purchasers were not damaged under the Clayton Act and the
22 Sherman Act, they were saying that for various reasons we are
23 not going to permit that claim.

24 What they also said in Illinois Brick is direct
25 purchasers pass over charges to indirect customers who are

1 the ones ultimately damaged. They recognize that. That's in
2 the majority and in the dissent in Illinois Brick.

3 And, you know, plausibility, I'm not sure what type
4 of present the Supreme Court gave us there because we all
5 debate what it means and counsel said it doesn't make sense.
6 I don't accept that if the rationale is does it make sense
7 for me to come in or in my brief throw in a lot of facts that
8 are not in the complaint and ask the Court to accept them,
9 and then to determine and adjudicate who is right and wrong.

10 I want to put in context one aspect of Twombly and
11 one aspect of what we are doing here that I think
12 demonstrates why that is the wrong approach. We talked a lot
13 yesterday about the number of people who pled guilty -- I
14 should have said at the outset, I've got a bit of a cold so
15 I'm going to try to be coherent, and I apologize if I lose my
16 track on that, but there is a lot ofchutzpah to the argument
17 the defendants are making here.

18 Now, I think there are ten defendant families I'm
19 going to say left in my case, five of them have pled guilty,
20 I think one of them just had a criminal information filed
21 against. And one other thing we didn't talk about yesterday
22 but I think when we look at complaints and we use our wisdom
23 and reason to determine is what is set forth plausible or
24 Judge Breyer in the Northern District I think in my
25 Trans Pacific case said, look, my job is just to look at

1 everything they alleged and say is it possible that what they
2 said is true or does it strike me that, no, that's not good
3 enough to let you go forward to discovery. It is not a high
4 test. Even Twombly talked about nudging it across the line.

5 Congress passed the Antitrust Criminal Penalties
6 Enhancement Perform Act, and what that said is when you all
7 participate in the conspiracy the one of you that comes in
8 first and squeals on the others doesn't get charged. So the
9 fair inference from that, Your Honor, is that in addition to
10 those five who have pled there is someone else in that box
11 who is the one who went to the Government and told the story
12 about the others.

13 So here we have these defendants, five of whom who
14 pled, one of whom who likely is what we call the amnesty
15 applicant and is thus cooperating with the Government in
16 exchange for not being charged, entering pleas in courts like
17 this one in front of a flag like that when they violated U.S.
18 law and the Sherman Act, and entering a plea that said, for
19 example, from the Furukawa one that we placed before the
20 court earlier this week, quote, in light of the availability
21 of civil causes of action which potentially provide a
22 recovery of multiple damages, the sentence does not include
23 restitution, meaning we are not paying back any victims here,
24 but then they come in and notwithstanding the prefatory
25 comment here about we know we pled guilty and we are not

1 saying we are not responsible, they tell you that not one
2 single plaintiff in this courtroom can state a claim against
3 them. And one way they tell you that is they say, well, my
4 group, the end payors, we didn't say which wire harness for
5 which car we bought. They know. They know but they don't
6 say. It is not in their plea agreements. They say we don't
7 say how much did it cost. They know because they are the
8 ones who got together and fixed the prices for it. It is not
9 in their plea agreements so they won't tell us. And, in
10 fact, they think that information is so highly confidential
11 and they think their right to protect it is so powerful that
12 we shouldn't even be allowed to have access to it. If you
13 will recall, we wanted it at that first status conference and
14 they said, no, you've got to overcome the motion to dismiss
15 first, so we didn't have it when we filed our complaints, but
16 now they are telling this Court we need to say which wire
17 harness was fixed and we need to say how much did it cost
18 before we can go forward. They know that's impossible
19 because they are the only ones with that information, and
20 that is not the standard.

21 Five pled guilty, one is likely cooperating. The
22 cost goes to the OEM, we know that, that's who they fixed the
23 prices to. To suggest that the OEM doesn't pass on its cost
24 of goods sold to its customers, that's not plausible. And we
25 alleged antitrust injury in our complaint, we alleged we paid

1 the increased cost in our complaint, that's sufficient. And
2 there was this discussion -- and I feel I got a bit of a
3 moving target here because there was a discussion about this
4 standard of pleading that somehow Twombly isn't just about
5 plausibly pleading a conspiracy, which is what it is, which
6 is what the Supreme Court said, it is about is the conspiracy
7 properly pled to permit you to go forward and do discovery.
8 There is no doubt here. They're quibbling about the metes
9 and bounds of it; was it this product or that product and did
10 I do it or what time period was it. Like I said, no one
11 knows that but them, it is their choice to keep that secret.
12 But in terms of injury they tell the Court, all of these
13 cases I heard today, the First, Third, Eighth, I don't know
14 what, say you have to plead more of injury in fact. I didn't
15 see those in their briefs, Your Honor.

16 What I saw in their briefs, I saw one case called
17 Taylor vs. Key Corp., Sixth Circuit case, that's in their
18 reply. That's where they say plaintiffs are wrong,
19 plaintiffs say they don't have to prove it, Taylor v.
20 Key Corp. Taylor v. Key Corp. is a case where a plaintiff
21 sued their employees' stock plan saying that someone engaged
22 in some form of securities fraud, and the plaintiff
23 affirmatively alleged that she profited from it because she
24 sold when the stock was artificially inflated. So what the
25 Sixth Circuit said is you pled yourself out of it because you

1 pled you benefited, you never pled that you were damaged.

2 That's not our case.

3 In their opening brief they cited Brown vs.
4 Matauszak, that's a federal appendix case from I think this
5 circuit. It is a prisoner case where a prisoner trying to
6 fill in the form on his complaint that he was deprived of his
7 right to file a claim in court had it dismissed because in
8 filling out the forms he never actually said what his claim
9 was, and the court said you have to do that because that's an
10 element of the claim. That's not this case.

11 So this case involves the people who the Supreme
12 Court in Illinois Brick and all the state legislatures who
13 passed these repealer statutes said are the real victims
14 because we are at the end of the line. We can't pass costs
15 on to anyone else. Everyone above us -- and, Your Honor, I
16 handed to counsel and the Court just a few slides. I would
17 like, if we could, it has got a cover, it says end payor
18 plaintiffs' illustrations.

19 THE COURT: Okay.

20 MR. WILLIAMS: I want to show from our complaint
21 that there is, like I said, this idea of does it make sense
22 and then this is how people buy cars and all of these
23 different things could happen. None of that is in our
24 complaints. Two percent is not in our complaint. What's in
25 our complaint describes the supply chain in that first slide;

1 it goes from an OEM -- I'm sorry. It goes from a defendant
2 to Toyota, to the dealer, to us. That's four -- well, that's
3 three really.

4 Now, the Court may note I put the tier one with
5 Toyota there, and I just want to explain why I did that.
6 Yesterday one of the attorneys talked about this whole direct
7 pricing issue. That's where, for example, Toyota negotiates
8 its price with a defendant or gets a price-fixed price from a
9 defendant and then tells its supplier who maybe makes the
10 body part of a door go buy on my price, I negotiated the
11 price already, you are going to buy on my price and then give
12 me the finished product to stick in the car to sell to the
13 dealer. It is the same level. It is not another chain or
14 another link in the chain.

15 And if I can ask the Court to turn to the next
16 slide I did, this is the parts chain that we heard was so
17 complex and variable and will never figure this out. The
18 term aftermarket was used, and I have to object to that
19 because that's a term of art in this business. Aftermarket
20 means someone other than the OEMs' parts. We are not talking
21 about people who bought some other wire harness for a Toyota
22 Camry. I don't know if you can do that. As counsel said,
23 when they negotiated these prices through these bid-rigged
24 auctions they won the business for years. So if my Camry
25 owner was in an accident and had to replace his wire harness,

1 he's going to go to the dealer and he's going to get the
2 defendant's wire harness from that dealer at the shop or he's
3 going to get it from a distributor to a repair shop. So,
4 again, it is a very short chain. It is not difficult.

5 The last slide, I won't take a lot of time on it,
6 is this is the Intel case, and defendants and we cited to it,
7 it was discussed during counsel's argument. That's how many
8 different paths of distribution were present in that case.
9 The court there said there is no problem because all you need
10 to do is your complaint, you're pleading whether or not
11 someone violated the antitrust law and you should get to go
12 forward. You are not proving it.

13 In fact, I cited Taylor and Brown. If you look at
14 the brief they gave Your Honor when they filed their motion,
15 and they say plaintiffs have to prove, they have to prove how
16 much they paid, they have to prove the amount, they have to
17 prove. They cited six class certification summary judgment
18 cases. I will stipulate to that now, that those are cases
19 that govern standards of class certification and summary
20 judgment, but we are not there, and effectively what they are
21 asking you is give them summary judgment now. Effectively
22 what they are asking you is the only ones who maybe can ever
23 file a claim against us are the OEMs, that's what they are
24 telling all of these different groups, and there is no basis
25 for that for you to throw these claims out at this point.

1 And when these states passed these so-called
2 repealer statutes and said we recognize the prudential
3 limitation the Supreme Court has put in place, we disagree.
4 What they said is we want the residents of our states, we
5 want the victims of price-fixing conspiracies to have a right
6 to recover their damages. And I think it is worthwhile to
7 look at how far back these laws go because most of these
8 states had antitrust laws before the Federal Sherman Act was
9 put in place. That's how far back these cases go. I'm just
10 going to allude to that for a moment because on this
11 interstate law issue uniformly the cases we cited to you that
12 have come down in these types of cases, someone who is price
13 fixing to an OEM and then it is put in the chain of
14 distribution and sold throughout the country, uniformly they
15 say if the effect is felt when the customer buys the product
16 with the inflated price you have satisfied your burden.

17 The ones that don't are, and there are few, almost
18 all from either the 1900 or 1910 because then there was a
19 theory that there was dual sovereignty, that the federal
20 government regulated the federal economic system and the
21 states regulated the state economic system, and those did not
22 mix, but that's been discarded. The question now is, is the
23 effect of it felt because that's the reality of what the
24 economy is and it is the reality of what these legislatures
25 did when they said notwithstanding what the Supreme Court has

1 said for prudential reasons we choose to give our citizens
2 the right to seek damages against those who have fixed
3 prices.

4 And on this Associated General Contractors issue,
5 what the defendants I think really have advocated, and there
6 were little ships passing in the night on this one, they say
7 we are saying we don't ever have to prove standing and we
8 don't have to prove injury, we don't say that, I don't think
9 we said it anywhere, but they do seem to be suggesting that
10 that standard should apply to all of these claims. Just
11 think about the fundamental inconsistency there. AGC,
12 American General Contractors, construed the Federal Sherman
13 Act which had already been determined not to permit indirect
14 purchaser suits. So the analysis of standing that it gave in
15 that case was by definition for those who had standing to
16 assert a claim under the Sherman Act by definition had
17 nothing to do with Illinois Brick repealer, states that said
18 notwithstanding that you can go forward and sue.

19 And we cited to the Court the ARC America case, and
20 that was a case that came after Illinois Brick. The
21 importance of that case is that what it said was -- I think
22 what happened is a defendant came in and said this is not
23 fair because now I can get sued under the state law and I can
24 get sued under federal law. I might have to pay twice. No,
25 put aside the first answer, which was then don't violate the

1 Sherman Act in the state law. Well, the court said that's
2 the choice of the states. We in the federal Government, we
3 don't have the power to tell the states they can't provide
4 that remedy, and if they choose to provide that additional
5 remedy that is within their powers and there is nothing we
6 can do to disrupt that. And that's why, for example, in the
7 GPU case that you have seen, two decisions in that case, the
8 court said it is not up to a federal court to sit here and
9 overrule the legislatures and courts of all of these
10 different states based on a federal case, I can't do that.
11 And the better approach has been if a state high court or the
12 legislature has said we want to apply these standards then
13 you do, not if a trial court in North Carolina in a case
14 involving a rubber additive decided to apply it, that's not
15 dispositive.

16 And the primary case that the defendants rely on on
17 this point is really the DRAM. You see the DRAM case again
18 and again about this point. Just a couple points on it.
19 First, the DRAM case was probably the first federal judge
20 that had to look at this on a CAFA case because of the
21 timing. It was an early class action that involved indirect
22 purchasers, after the statute they all got filed in front of
23 Judge Hamilton.

24 And two important points on this. The first is she
25 certified her order for 1292. She -- the orders say what

1 they say, and I'm going to come back to them in a second, but
2 she then said there's substantial ground for difference of
3 opinion about this, certified it for a 1292 appeal. The
4 Ninth Circuit took it. That's on appeal right now. And
5 meanwhile, all of these cases are done and settled and those
6 defendants have paid hundreds of millions of dollars in those
7 cases, but that's not a final decision. It was the first one
8 out, and I think Judge Hamilton got it wrong because what she
9 focused on there was not really the seven elements, assuming
10 all seven apply, she focused on the first. She said well,
11 you bought a computer and in the computer is a -- DRAM is a
12 memory chip, dynamic random access memory chip. The chip is
13 in there but you're not really in the market for chips, it is
14 not close enough, but, like I said, in her order she said
15 there is substantial ground for difference of opinion about
16 that. And, in fact, that was the first in the line of these
17 so-called component part cases, DRAM, SRAM, LCD, TFT, CRT,
18 where most of the purchasers bought the product. They are
19 not in the market for the component part. Other than
20 replacement parts we are not in the market for wire
21 harnesses, we buy cars. But what every court said after DRAM
22 said that's the same market, they are inextricably
23 intertwined because there is no purpose to a wire harness for
24 a Camry but to go in a Camry, and if you are buying a Camry
25 that's the appropriate market.

1 And in one of the ways I think that the arguments
2 are moving a little bit, I'm trying to wind up with them, is
3 the idea that in the briefing it seemed to me the argument
4 was you've got to plead the amount, the nature and the
5 mechanics of passthrough in your complaint, and there is no
6 case that says that.

7 In the slides today it seems to be you have to say
8 the percentage, that that is -- the essential element is the
9 percentage of the passthrough. Well, as I said, because they
10 won't tell anyone there is no way we could do that. And a
11 fundamental concept in antitrust law has been for years and
12 years that -- I could pull a number of cases out, this comes
13 from the new motor vehicle cases we all cited, quoting the
14 First Circuit, that we have long crossed the bridge of
15 precision of proof of causation and extent of damages in
16 antitrust cases. We recognize antitrust suits covering as
17 many as it must, many imponderables, rigid standards of
18 precise proof would make a plaintiff's task practically
19 hopeless. That generally applies now.

20 This is a price-fixing case involving specific
21 component parts that are the same thing when they leave the
22 defendant and they go to the OEM and they are put in the car
23 and they go to the dealer and they go to my client, it is
24 still that same part, and it has a value and it has a price
25 that was set that can be traced through. And all of these

1 component cases, that's what all of these courts let the
2 plaintiff have an effort to try to prove, what was the
3 inflation and how was the cost passed through. But the idea
4 that a defendant can withhold information and evidence about
5 its own violation of the Sherman Act and then say throw them
6 out of court because they don't have the details is offensive
7 to that principle that you don't --

8 THE COURT: Could you get that information from the
9 OEMs -- could you have gotten it from the OEMs?

10 MR. WILLIAMS: The information on how much --

11 THE COURT: The parts costs.

12 MR. WILLIAMS: They cost for the courts?

13 THE COURT: Yes.

14 MR. WILLIAMS: What I would say is through this
15 Court's jurisdiction we can get that information. As a
16 customer we could have gone if we were buying just the repair
17 part and gotten their sales costs, how much are they going to
18 sell it to us for. I doubt in an arm's-length transaction we
19 could walk in and say tell me how much you paid for it. The
20 routine manner of proof in these cases involves the bill of
21 materials, which is this term for all of the elements of cost
22 that a manufacturer puts into our product that then sells to
23 a consumer, and time and again that's the substance of what
24 we look at and our experts look at to determine overcharge
25 and to determine the mechanics of passthrough.

1 As to the entire car I think it would be even more
2 challenging to go and ask them, tell me how much you, Toyota,
3 paid Denso for the ECU. I don't know that we can do that
4 without -- now, obviously with subpoenas we think we can, we
5 think that's the means by which we do that.

6 In terms of the AGC analysis, I don't want to
7 repeat what's in the papers, and they have their chart and we
8 have our Exhibit 3 to respond to our chart, but what I would
9 like to do is really refer the Court to the component part
10 cases that have followed since DRAM and we have cited to
11 them, which is the D.R. Ward case, the GPU case, the LCD
12 case, the Flash Memory case and the Aftermarket Filters
13 cases, as setting forth the appropriate standard which you
14 look for that clear direction from the high court and from
15 the legislature, and in the absence of it you don't choose to
16 put a limitation on that state's laws that that state's
17 legislature did not choose to make.

18 I want to step back for a moment because I didn't
19 cover this, I was lead counsel for the direct purchasers in
20 the SRAM. The SRAM is a different type of memory chip, it is
21 a static random access memory chip. You know, we are not
22 buying the two percent because we have no basis to. We don't
23 think it is a basis for decision for this court. I can
24 assure you that the static random access memory chip in those
25 computers there is substantially less than two percent of the

1 cost of those computers. Those complaints were upheld.

2 And the idea that we have to plead and prove those
3 mechanics and those numbers now has not been accepted by any
4 of those courts, it was not required. What was required is
5 the allegation that I bought the product with the price-fixed
6 part and I paid a super competitive price and an inflated
7 price because of the price fixing.

8 I wanted to comment just briefly, our class is
9 purchasers of new cars. There is this extended analogy in
10 the reply brief about used car buyers and there would be no
11 limits and how would we ever know -- I don't know what to
12 tell them about that because that's not our case.

13 THE COURT: We don't have used cars in here.

14 MR. WILLIAMS: We don't have used cars here so it
15 is the parade of horrors and I understand why you do it but
16 it is not this case.

17 I want to comment on the types of cases that they
18 showed you in that slide with the percentages, and I don't
19 think that's the analysis the courts did was to say you made
20 30 percent, you get to go forward, but the cases in which it
21 wasn't permitted, first of all, this Magnesium Oxide I think
22 it was, it is hard to say what happened in that case because
23 it looks like the plaintiffs didn't even know how much was in
24 the product because they said something like up to four
25 percent can be this, which I presume means it could be less,

1 it could be more. It is the same for the Rubber Elements
2 case, is that the rubber that went in the tire, the North
3 Carolina case, because sometimes maybe it is .1 percent,
4 sometimes it is 1 percent, sometimes maybe it is 10 percent
5 but it is different all the time because unlike this
6 component product that is the same thing from the beginning
7 to the end, this is a part of a -- I don't know, it is an
8 ingredient in something that you can't even measure or define
9 or be precise about how much of it is in there. That I think
10 was the dispositive issues in those cases, not the amount of
11 how much it was.

12 I think if you even look at Judge Alsup's opinion
13 in the Magnesium case that was given to you, he says
14 something about if the plaintiffs alleged it was inextricably
15 intertwined with what they bought that would be good. I
16 can't give you the paragraph now but I think we have alleged
17 that in our complaint because it is, the wire harness is
18 inextricably intertwined with the car it goes into, it has no
19 purpose other than that.

20 I'm not to going to go on very long about the Shady
21 Grove case. You know I think that the Optical Disk Drive
22 case we cited just rejected the same challenge.

23 I do want to cover a couple issues very briefly
24 that were not addressed in the argument that are in the
25 briefing, this concerns the retroactive application of the

1 Hawaii and Nebraska laws, the laws where they are saying
2 those states didn't repeal until relatively recently. It
3 seems to me that if that's true then that defines how far
4 back your damage claim may go. If it is true it has no
5 significance to discovery in this case because they are not
6 going to give us different discovery based upon the fact that
7 New Hampshire claims only go back to 2008. You know, I can't
8 think of any difference that would make to them.

9 And I note as well that their argument as to Hawaii
10 was rejected in the SRAM case specifically. Their argument
11 to Nebraska was rejected in the LCD case specifically, and
12 they said Judge Bilstein got that wrong in LCD because she
13 didn't read the legislative history. Well, she read the
14 Supreme Court in Nebraska's opinion and that's where she got
15 her rationale from, so I think she got that one right.

16 In terms of the interstate commerce, we think our
17 allegations are there. We think that this concept that they
18 have to have done something in the state has been discarded
19 when the concept of dual sovereignty was discarded, so we
20 think we are well past that.

21 And then a few -- I will try to go through these.
22 There is this issue about having to plead fraud in Florida.
23 That's not an element of the statute. It is one type of
24 unfair practice. I think they rely on Packaged Ice for that.
25 Packaged Ice didn't look at antitrust or price-fixing cases

1 when it reached that conclusion. We would suggest Processed
2 Eggs and the Gastaldi case provide the better part of the
3 rule.

4 Similarly as to unconscionable conduct for
5 New Mexico, for the District of Columbia, for North Carolina,
6 we have given you authority by which all of those states deem
7 bid rigging and price fixing to be unconscionable conduct.

8 I'm going to go ahead to a couple of the cases they
9 cite where they are saying your interstate commerce
10 allegations were insufficient, and they cite, for example, a
11 Meridian project case from California to try to throw out
12 some of our claims there. If you look at the case, it is a
13 case involving a Chicago misconduct and a Canadian plaintiff.
14 It had nothing to do with California, it didn't allege
15 someone was harmed there. It is just not bearing on the
16 issues before the Court.

17 I think the remoteness issues under their consumer
18 protection claim are really covered by what we have
19 discussed, which is the conduct took place, it was intended
20 to raise the prices of the products, there is very few links
21 in this chain, they understood manufacturers were going to
22 pass the increased costs on. It is not realistic or
23 plausible to think that they didn't know and expect that.

24 In terms of unjust enrichment there are a couple of
25 cases I think we may not have had in our brief, I told

1 counsel before, that we would cite that have upheld these
2 same claims. The first is the Hanlon case, which is --

3 THE COURT: Hanlon?

4 MR. WILLIAMS: H-A-N-L-O-N, 150, F.3rd, 1011. The
5 Abbott Labs case, which is 2007 West Law 1689899, the
6 Westways World Travel case, 218 F.R.D. 223. The last one is
7 the SRAM case at 264 F.R.D. All of those upheld unjust
8 enrichment claims over these types of arguments. And,
9 frankly, I think in all fairness the arguments that were made
10 about unjust enrichment today are addressed in our brief, I
11 don't think they are very different from what we all put in
12 our papers, and I would submit to the Court on what we
13 briefed on unjust enrichment.

14 Then the last part is injunctive relief, and I
15 think we have established that we are the end payors, we are
16 the ones the cost gets passed on to and no one else can pay
17 it or we can't pass it on to anyone else, that the states
18 gave us the right to bring these claims, that they didn't
19 quantify it by it has to be -- you have to plead it is a
20 certain amount before you can go forward.

21 But on the argument that there is no reason to do
22 it, which I think is essentially saying one of us is
23 cooperating with the Government and the other five pled
24 guilty, but trust us, we won't do it again. That's not been
25 the case in certainly the cases coming out of California in

1 the electronic industry where one conspiracy has led to
2 another has led to another. We know these investigations are
3 still going on, and we have a pretty good reason to think
4 that there are other parts out there, and we just heard
5 yesterday about more parts are coming in. So the idea that
6 that should go away because we can trust them now, I don't
7 think you are going to find any cases ever that said that.

8 THE COURT: Okay.

9 MR. WILLIAMS: And I think the point, and I would
10 emphasize, the directs made yesterday was it's an element of
11 relief in any event, it doesn't change what we are all doing
12 here, it is just an element of relief that we may be able to
13 have at the end of the case.

14 THE COURT: All right.

15 MR. WILLIAMS: Thank you, Your Honor.

16 THE COURT: Ms. Sullivan?

17 MS. SULLIVAN: Your Honor, I know it is getting
18 late and I'm sure you're hungry, and I will be very quick.

19 Just a few points I want to make in response to the
20 end payors' presentation. First of all, we are not asking
21 for summary judgment now. Lujan states that there are
22 elements that are required to establish standing to have a
23 claim, and those elements are injury and causation.
24 Antitrust standing is a concept that states that injury --
25 the injury that you allege has to flow from that which makes

1 the conduct that you are alleging to have occurred unlawful.
2 These are pleading requirements, and Twombly says that
3 plaintiffs have to allege facts that establish each element
4 with plausibility.

5 A couple of cases that he just mentioned that are
6 on the slide that I referred to earlier, and SRAM is one of
7 them. Just to clarify, Mr. Williams said that SRAM was less
8 than one percent I think of the proportion of the end
9 product, and actually the plaintiffs in that case allege in
10 their complaints, which is in the packet that we sent up
11 earlier, that the cost of SRAM to a direct purchaser OEM was
12 a significant cost component in the selling price of that
13 OEM's electronic products, and they allege that the
14 overcharge was passed on 100 percent through each level of
15 the distribution chain. And, of course, these plaintiffs
16 have not alleged that and, in fact, the end payors can't
17 allege that because the auto dealers say that they did not
18 pass on a significant portion of it.

19 Magnesium, Mr. Williams noted or surmised that the
20 plaintiffs in that case didn't know what portion of the end
21 product magnesium made up, and that's actually not true. The
22 decision states clearly that the plaintiffs actually alleged
23 that they bought the cattle feed specifically for the
24 magnesium, they knew exactly what percentage the magnesium
25 made up of the cattle feed, and the court held that four

1 percent was still not enough.

2 Finally, this suggestion that it is impossible for
3 the plaintiffs to allege what they bought just doesn't make
4 sense. We are not saying that they have to allege this
5 specific percentage, that's not what that slide was about.
6 They have to allege something though that links the
7 defendants' conduct to their claimed injury. They claim that
8 they were injured because they bought cars, and the conduct
9 relates to wire harnesses. There is no link between the two.
10 You have got two groups of indirect purchasers here, auto
11 dealers and end payors who bought from the auto dealers, and
12 even between the two of them they have no allegations about
13 any kind of passthrough or anything that links their injury
14 to any conduct.

15 Mr. Cuneo, very quickly, referred to an overcharge
16 of two percent that he suggested the defendants had put in
17 our briefing. That's not at all what we indicated. We
18 didn't represent that there was any overcharge of two
19 percent, that's footnote three of -- in our opening brief,
20 and all it says there is that the plaintiffs did not allege
21 what portion of the cost of an end product a wire harness is
22 and that we believe that all of these products together, all
23 13 of them together, make up at most two percent of a car,
24 but that was not suggested -- or not intended to suggest in
25 any way that there is a two-percent overcharge on anything.

1 He also noted that wire harnesses and related
2 components are a very large component. That's not in the
3 complaint. And he noted that a wire harness is the central
4 nervous system of the car, and that is in the complaint but
5 that relates solely to the functionality of a wire harness,
6 that doesn't relate at all to the cost issue that we have
7 been discussing.

8 And then finally, Mr. Cuneo said that the injury
9 that they have alleged is as direct as you can get without
10 being an OEM. That's really what this is all about. These
11 are not OEMs, neither group of them is an OEM, and they
12 allege nothing that suggests that a price for a wire harness
13 charged to an OEM then translates into a higher price for a
14 car several steps down the chain.

15 THE COURT: Okay.

16 MS. SULLIVAN: Thank you, Your Honor.

17 THE COURT: Ms. Fischer?

18 MS. FISCHER: I will be equally brief. I just want
19 to hit a few points.

20 On Shady Grove, Mr. Cuneo did not say that the
21 class action bars don't survive, he said it was a timing
22 issue. Mr. Williams said that they cited to ODD, Optical
23 Disk Drive, to show that the South Carolina class action bar
24 survives. If you look at that case, that case simply says we
25 don't find defendant's argument persuasive, we have no idea

1 on what ground the court found it unpersuasive. There have
2 been numerous cases from this district who have construed
3 statutes just like the South Carolina one to have class
4 action bars that survive. So I invite you to read ODD but I
5 also invite you to read the other cases we cite because I
6 think that the trend is plainly in our favor and that there
7 is no support and no reasoning whatsoever given for the
8 South Carolina decision.

9 As for the timing issue, it is absolutely not
10 improper to dismiss these class action claims at this stage.
11 Wellbutrin did it, Digital Music did it, and this court in
12 Packaged Ice said it would have dismissed if it hadn't
13 already dismissed the Montana claim for other reasons.

14 It is absolutely appropriate to dismiss the class
15 claim even if the person can make a claim on their own, and
16 the Supreme Court actually said in Twombly when the
17 allegations in a complaint, however true, could not raise a
18 claim of entitlement to relief, this basic deficiency should
19 be exposed at the point of minimal expenditure of time and
20 money by the parties and the court. That applies equally to
21 Mr. Williams' retroactivity point. He said oh, this won't
22 really affect discovery, et cetera. I disagree with that,
23 but in any event it is appropriate to get rid of it.

24 In terms of his points on retroactivity, the Hawaii
25 point is this, the case that they rely on from the Hawaii

1 Supreme Court does say that individuals had a private right
2 of action under the antitrust section of the Hawaii statute
3 but the class action right to bring private claims was not
4 provided until 2002 and the statute itself makes it explicit
5 that it is not effective until the date of the actual
6 enactment, which was June 28th, 2002.

7 In terms of Nebraska, the cases that they cite, one
8 didn't even construe the antitrust act, it was construing the
9 Consumer Protection Act under Nebraska law, and the other one
10 really did not even consider the legislative history.

11 Last issue I want to cover is on the intrastate
12 effect. He said -- I think Mr. Williams said that
13 essentially they think they have done enough here because
14 they have alleged that they have paid higher prices. Your
15 Honor, they don't allege a single state in which they
16 purchased a car, that is completely within their knowledge.
17 I don't think that given the nature of a car, which is a huge
18 big-ticket item that you buy once every X many years, that
19 they are necessarily entitled to an inference that they must
20 have bought the car in the state in which they reside. I
21 know -- I certainly know examples of people who will go to
22 the next state over to take advantage of a better deal or
23 even a better sales right. Completely within their
24 knowledge, they haven't pled it, and without pleading where
25 they bought it how can we infer affect much less injury

1 anywhere? Thank you, Your Honor.

2 THE COURT: Thank you.

3 All right. We have I think Fujikura, TRAM. Does
4 anyone want to add -- anybody who has filed separately?

5 MR. COOPER: For Fujikura, as we discussed
6 yesterday and then this morning, those will be dismissed and
7 we will provide orders.

8 THE COURT: Okay.

9 MR. CUNEO: Your Honor, we also have Yazaki which
10 essentially is --

11 THE COURT: It just adopts it.

12 MS. FISCHER: Correct, we just adopt it, we have no
13 further argument.

14 MR. KLEIN: Your Honor, for TRAM we have nothing --

15 THE COURT: Wait a minute. Let's get this on the
16 record. Let's go back to Yazaki. As I have Yazaki, and as I
17 read it, it is only a couple pages, you just adopted the --

18 MR. CUNEO: That's correct. At the same time I was
19 going to use the argument to respond to something that was
20 just said, but I won't do that if it doesn't please the
21 Court.

22 THE COURT: Does it please you?

23 MS. FISCHER: No.

24 THE COURT: I don't think it is necessary.

25 MR. CUNEO: Thank you.

1 THE COURT: I can't imagine what else you could
2 have. Thank you.

3 MR. SELTZER: Your Honor, I would like to be heard
4 briefly with respect to the end payors' opposition to the
5 Tokai Rika motion.

6 THE COURT: The end payors' Tokai Rika which we did
7 earlier?

8 MR. SELTZER: Yes, that was heard yesterday with
9 respect to the direct purchasers, and now I would like to be
10 heard with respect to the end payor. This is Marc Seltzer of
11 Susman Godfrey.

12 There was an argument that has been made that the
13 allegations are insufficient to charge both defendants with
14 involvement in the wire harness conspiracy, in any event not
15 to charge the parent for the acts of the subsidiary.

16 I want to make a couple of brief points, Your
17 Honor. First of all, it is a basic principle of law of
18 conspiracy that once a conspiracy is shown only slight
19 evidence is needed to link another defendant with that
20 conspiracy. You will find that in case after case. One case
21 that says that is Apex vs. DiMauro, it is a Second Circuit
22 case 822 F.2d 246, and that appears at page 258. That's a
23 trial principle. We are now at the pleading stage. It is a
24 much lower standard now to establish once there is a credible
25 allegation or a plausible allegation that a conspiracy exists

1 to link up the defendant with that conspiracy. I think it is
2 impossible to fairly say that there is not a plausible
3 allegation that there was a wire harness price-fixing
4 conspiracy given the fact that multiple defendants have plead
5 guilty to participating in that conspiracy.

6 The other point I would make, Your Honor, and this
7 relates to the request for judicial notice that was the
8 subject of yesterday's discussion, the defendant did not
9 object to having that be considered by the Court. What is in
10 that request for judicial notice is highly significant.
11 Tokai Rika, the parent, has pled guilty -- or has agreed to
12 plead guilty to two crimes, one participating in a
13 price-fixing conspiracy regarding heating control panels and
14 one to obstruction of justice with respect to the
15 investigation being conducted by the Grand Jury in this very
16 district.

17 Now, in our complaint we allege that on
18 February 23, 2010 that there were three companies in this
19 district whose offices were raided by the FBI, one was Denso,
20 one was Yazaki and one was TRAM. That was the same date that
21 there were raids being conducted simultaneously by European
22 and Japanese authorities, that appears at page 170 of the
23 complaint.

24 Here is what Tokai Rika said about that raid in its
25 reply brief, and that was filed on October 26th, 2012.

1 Quote, it does bear repeating that as to the FBI raid, an
2 allegation about an investigation that has not borne fruit
3 and the subject of which has not been specifically identified
4 is insufficient to establish that TRAM, much less that
5 TR, Limited, that's the parent, participated in the
6 conspiracy alleged.

7 What do we know about that raid? We know about
8 that raid that Denso that was raided has agreed to plead
9 guilty for fixing the price of electronic control units and
10 heating control panels, and that Yazaki, the other company
11 that was raided, has agreed to plead guilty for fixing the
12 price of wire harnesses, instrument panel controls and fuel
13 senders. These aren't unrelated conspiracies, it is all part
14 of one investigation and involving overlapping
15 co-conspirators.

16 Now, just four days after that reply brief was
17 filed with this Court the Justice Department announced on
18 October 30th that the parent company, Tokai Rika, had agreed
19 to plead guilty, as I just said, so that raid which was
20 characterized as not bearing fruit has produced three guilty
21 pleas, but it is also significant that there is a plea to
22 obstruction of justice, and what did the Department of
23 Justice say about that, and that's in the request for
24 judicial notice. According to the Department of Justice on
25 February 2010, that's when the raid took place that we

1 alleged in our complaint, after the parent and its executives
2 and employees became aware that the FBI executed a search
3 warrant on Tokai Rika's U.S. subsidiary, that's TRAM, the
4 other defendant we sued, a company executive directed
5 employees to delete electronic data and destroy paper
6 documents likely to contain evidence of antitrust crimes in
7 the United States and elsewhere. The Department said as a
8 result electronic data was deleted and paper documents were
9 destroyed and some of the deleted electronic data and
10 destroyed paper documents were non-recoverable.

11 So the parent who had said there is absolutely zero
12 evidence that it was involved in the price-fixing activities
13 and that we were seeking to hold it liable for the acts of
14 its subsidiary is the one that pleaded guilty to obstructing
15 justice involving the investigation that began to its
16 knowledge when that raid was conducted in February 2010 in
17 this district.

18 Now, the law is that a plea of guilty in a related
19 product industry can be considered by the Court in
20 determining whether or not a complaint raises a claim of
21 plausible price-fixing conspiracy in a related product.
22 There are multiple cases that say that. For example, the
23 Seventh Circuit decision in High Fructose Corn Syrup, that
24 was a decision by Judge Posner when he dealt with the law
25 applicable to a claim of conspiracy involving high fructose

1 corn syrup where a Grand Jury had been impanelled but then
2 discharged without indicting as to that product but where
3 there had been indictments and convictions for related
4 product, citric acid and lysine, and he said it was proper to
5 consider those earlier guilty plea proceedings and
6 convictions in determining the plausibility of a claim
7 involving high fructose corn syrup.

8 Now, we also have alleged facts that make the
9 allegations of conspiracy plausible; they have to do with the
10 structure of the industry, the concentration of the industry,
11 the fact of the increasing prices when costs remain the same,
12 other facts as well to back up the allegations that the issue
13 here is whether or not the plaintiffs should be allowed to
14 proceed to take discovery against these defendants in the
15 face of which just happened where you not only have a plea of
16 guilty to price fixing but also a plea of guilty to
17 obstruction of justice where every kind of adverse inference
18 can be drawn against a party that engages in that kind of
19 conduct, and every kind of evidentiary sanction may
20 ultimately be employed against that party where they
21 destroyed documents related to the division's investigation
22 of price fixing in the auto parts industry. I submit, Your
23 Honor, that it would be inappropriate to dismiss the case at
24 this time.

25 Now, the other point I would make, Your Honor, we

1 try to be responsible in naming defendants in these cases.
2 We haven't named everybody that we could possibly name. We
3 try to name parties that we think at the end of the day we
4 are going to be successful in investing time and money and
5 going to trial and winning against the defendant at trial.
6 That's the decision-making process we go through in these
7 cases. It may be that after we take discovery that the claim
8 against Tokai Rika we decide is not one that is -- is one
9 that should be pursued, but that's a decision not to be made
10 at this time, it is to be made only after we have had a
11 chance to take discovery.

12 Thank you very much, Your Honor.

13 THE COURT: Thank you.

14 MR. ROMANO: Your Honor, may I address the Court?
15 We are scheduled to argue last, and I hope we haven't been
16 skipped or forgotten.

17 THE COURT: You will all get your opportunity.

18 MR. ROMANO: My name is Sal Romano and I represent
19 GS Electech. We are the last scheduled.

20 THE COURT: Just a minute.

21 MR. KLEIN: If I can respond on behalf of TRAM?

22 THE COURT: I think we are going to break for lunch
23 and we will continue after.

24 MR. ROMANO: I may have misunderstood what was
25 happening and I just didn't want to get overlooked.

1 THE COURT: No, you're not overlooked. Let's -- it
2 is 1:20, let's resume at 2:30. Thank you.

3 THE LAW CLERK: All rise.

4 (Court recessed at 1:23 p.m.)

5 — — —

6 (Court reconvened at 2:38 p.m.; Court and Counsel
7 present.)

8 THE LAW CLERK: All rise. Court is now in session.
9 You may be seated.

10 THE COURT: I was looking for you over here and
11 here you are. Okay.

12 MR. KLEIN: Good afternoon, Your Honor.
13 Sheldon Klein on behalf of Tokai Rika. I want to briefly
14 respond to some points raised by Mr. Seltzer before we took
15 our break.

16 THE COURT: I thought you would.

17 MR. KLEIN: I don't know what I was thinking when
18 first I said I didn't think we would have anything to say
19 this afternoon before Mr. Seltzer started speaking.

20 Your Honor, I can't help but noticing that there is
21 a consistent theme to plaintiffs' arguments regarding
22 Tokai Rika, which is you should lower the bar on the normal
23 pleading rules that's required to state an antitrust
24 conspiracy claim about Tokai Rika. He says only slight
25 evidence is enough, you should lower the normal bar of having

1 to plead facts supporting Tokai Rika's participation in this
2 conspiracy. Well, that is not the law. It is not the law
3 that they can plead a claim against one defendant and then
4 keep on throwing more parties into the caption of the case.
5 The slight evidence standard is an old pre-Twombly standard,
6 it was articulated only in a small handful of civil cases.
7 But more -- but the pre-Twombly point is much more important.

8 Twombly is about what is required to plead a
9 conspiracy claim in an antitrust case, that is the precise
10 issue in the case. And in light of Twombly there is
11 certainly no way that the law can be that, no, you don't need
12 to plead facts supporting a plausible inference of the claim
13 against that defendant, you need to be -- you need to plead
14 something against one defendant and then after that Twombly
15 goes out the door, and there are many cases since Twombly
16 that stand for that proposition I believe in their briefs, I
17 don't have the cites at hand since it was raised at the last
18 minute.

19 He says that we admit that we fixed heater control
20 panel prices so that's enough, you should lower the bar about
21 what is required to plead our participation in this
22 conspiracy. And I thoroughly discussed yesterday, Your
23 Honor, and I won't repeat it, the case law regarding the if
24 there, then here logic that some courts have followed and why
25 those cases are off point, and that our plea in the heater

1 control panel conspiracy simply isn't probative and certainly
2 isn't sufficient when that's all that they have to hold
3 Tokai Rika as a defendant in this conspiracy.

4 Finally, Mr. Seltzer all but accused us of
5 misleading the Court in a sentence in our reply brief
6 discussing the status of the investigation of Tokai Rika.
7 Now, we are here representing Tokai Rika in a case about wire
8 harnesses, in a brief about wire harnesses, and the sentence
9 in question from which Mr. Seltzer read a snippet is quite
10 specific and, in any case, in context can only be about this
11 case. We talked about the conspiracy alleged, that's part of
12 the sentence. Now, we would need to not only be unethical
13 but the dumbest attorneys on Earth to file a brief four days
14 before we knew that our plea in the heater control panel
15 case -- or I guess I should say the information in the heater
16 control panel case was going to become public to include in a
17 brief a statement that we thought could possibly mislead the
18 Court. We didn't do it. The fact is that we wanted to tell
19 the Court about the outcome of the investigation. The
20 outcome was that there was no action taken with respect to
21 wire harnesses, that the only action was with respect to a
22 different case. We couldn't because it wasn't public. In
23 fact, we thought it would be public before we filed the reply
24 brief but because of scheduling issues it got deferred so we
25 couldn't discuss it in the brief, but you will recall

1 yesterday a central point of our argument is how we believe
2 that the outcome of the investigation requires the dismissal
3 of these claims against Tokai Rika, and it is not true and
4 there is no reason in the world that we would mislead the
5 Court about what was going on in anything, we didn't mislead
6 the Court, we were talking about this case and, you know, it
7 is more than a little concern to us that that suggestion was
8 raised.

9 We didn't mislead. The bar shouldn't be lowered.
10 The claims against Tokai Rika should be dismissed under the
11 pertinent pleading standards. If the Court has any
12 questions?

13 THE COURT: Okay. Are you saying -- I'm trying to
14 get this distinguished, the heater control panel from the
15 wire harness part of these cases. Obviously you must be a
16 defendant in the heater control?

17 MR. KLEIN: At the moment we aren't but if I'm a
18 betting man that's going to change.

19 THE COURT: Basically what you are saying is your
20 plea and the obstruction of justice had to do with shredding
21 of documents regarding heater control panels or do we know
22 that?

23 MR. KLEIN: The plea is not specific as to -- it
24 doesn't say in the heater control panel case. I mean, the
25 fact is that the Justice Department was aware of the document

1 problem, brought charges on the document problem, didn't
2 bring any wire harness claims. You know, there is nothing
3 that --

4 THE COURT: So is it that we weren't involved in
5 wire harnesses, we were involved in heater controls, is that
6 what you are saying?

7 MR. KLEIN: No -- well, I'm not sure I understand
8 the Court's question.

9 THE COURT: I'm just trying to distinguish,
10 plaintiffs are saying that you were part of this conspiracy
11 in the wire harness case and you, of course, through your
12 argument are saying no, we weren't, but now it turns out that
13 you are, in fact, in the heater control case or you, as you
14 say, you probably will be. The question is, can you use that
15 heater control panel plea, and I suppose I should ask this of
16 plaintiff, can you use that heater control panel plea to show
17 that you were involved in wire harnesses?

18 MR. KLEIN: Your Honor, we think the answer is no.
19 You know, the notion that we are a bad person so you might
20 have done anything doesn't fly, and we talked yesterday about
21 what I've called the if there, then here cases where courts
22 have considered pleas usually in a different geographic area.
23 For example, the Packaged Ice case that was here, there was a
24 plea as to a conspiracy in Michigan and the court considered
25 it with respect to a civil case for a larger area conspiracy.

1 There's a series of cases out in California
2 involving different types of memory products, that's the
3 flash memory, the SRAM, the DRAM, the cases that keep on
4 coming up. What's different about all of those cases is they
5 quite explicitly recognize that a plea -- whatever weight a
6 plea in a different case might have it alone isn't
7 sufficient, they explicitly say that. And it is simply --
8 you know, if it is a fact that can be considered it is only
9 together with specific facts with respect to that defendant's
10 role in the particular conspiracy.

11 And if you recall in one of the cases that I
12 discussed yesterday, and the name escapes me, the court
13 labeled the plea in the other cases contextual. First, the
14 court discussed the facts about that defendant's role in the
15 conspiracy that was the subject of the case and there were
16 specific factual allegations linking them, and then he said
17 there is also contextual facts, and one of the contextual
18 facts was they had pled guilty in a different conspiracy.
19 So, you know, perhaps it is a pebble on the scale, there is
20 no case that has held that because you did something wrong
21 there that's enough and the fact is that is the only thing
22 either in the complaint or, now that the plea in heater
23 control panels is public, in the record that links us to
24 this.

25 THE COURT: Okay. Response, Mr. Williams?

1 MR. WILLIAMS: Steve Williams, Your Honor, and I
2 will be brief on the last point.

3 No one is suggesting that because he pled in one
4 market that by itself with nothing else means you've
5 satisfied your obligation to plead a conspiracy in a
6 different market. What the cases --

7 THE COURT: Mr. Williams, wait a minute. So this
8 plea to the wire harness --

9 MR. WILLIAMS: The plea to heating control panels.

10 THE COURT: I'm sorry. To the heating control
11 panel does not come over to your wire harness case?

12 MR. WILLIAMS: No, it does, and I will explain why.
13 So the point counsel made was no court has ever said that by
14 itself is enough, but we are not saying that by itself is
15 enough. What the courts say is when you weigh the factors
16 towards plausibility that's a strong factor that you did, in
17 fact, conspire to violate the Sherman Act in one related
18 market makes it more plausible that you might have done it in
19 the other market, and then when you add the obstruction of
20 justice charge, which we just heard is undifferentiated, he
21 can't tell you it didn't involve wire harness, and everything
22 else we put in the complaint about who they all do business
23 is, the answer -- the correct answer we think from Fructose
24 and Flash and SRAM is it makes it more plausible, it is not a
25 factor by itself but it makes it all the more plausible.

1 THE COURT: Okay.

2 MR. WILLIAMS: Thank you.

3 THE COURT: Very good. Now, before I get to S-Y I
4 want to know if there is anybody else who wanted to add --
5 you wanted to add something, Counsel. Do you still want to
6 add something?

7 MR. CUNEO: I would add only this fact, if I didn't
8 say anything in response to something they said I assume that
9 I could rely and stand on my briefs?

10 THE COURT: You may rely on your briefs. Believe
11 me, they have been gone over quite extensively.

12 MR. CUNEO: Very nice of you. Thank you.

13 THE COURT: I think we have GS Electech. Did Denso
14 want to say anything else?

15 MR. CHERRY: Your Honor, can I speak from here?

16 THE COURT: Sure.

17 MR. CHERRY: Steve Cherry for Denso. You know, we
18 filed one motion against both complaints.

19 THE COURT: Right.

20 MR. CHERRY: So I feel we went through it all
21 yesterday and I don't see a reason to repeat it unless you
22 had any questions.

23 THE COURT: Okay.

24 MR. DAMRELL: I would like one response.

25 THE COURT: You are going to file -- you say one

1 response, do you mean --

2 MR. DAMRELL: Can I make a response to his
3 comments?

4 THE COURT: Okay. Go ahead. Can we have your
5 appearance first, please?

6 MR. DAMRELL: My name is Frank Damrell, Cotchett,
7 Pitre & McCarthy, for the end payors.

8 Your Honor, the only -- I will keep this very brief
9 because I'm about an hour and-a-half from a plane. I have
10 been waiting 17 years to argue a motion in federal court and
11 now I have to catch a plane, but that happens in retirement.

12 Look at, the point that I would make is this, the
13 plea agreements in these cases follow a typical pattern for
14 conspiracies. Conspiracies are cracked by cooperators, and
15 I'm sure in your experience you have seen many conspiracies
16 and the trials commence generally with a plea agreement or a
17 cooperation agreement. That happened here. As a result,
18 eventually a search warrant was issued after two plea
19 agreements, two cooperation agreements and the search of
20 Denso.

21 And the reasons why those agreements are effective,
22 I'm talking about the cooperation agreements, is because
23 there is an agreement to cooperate based upon the threat of
24 prosecution for other crimes which surely implies that other
25 crimes very well may be out there but are not being

1 prosecuted.

2 Denso entered into the same type of cooperation
3 agreement, and the cooperation agreement provided that you
4 cooperate or we are -- we may file further prosecution or
5 further charges against you.

6 The point I make is that the conspiracy concept
7 flows from those three cases, then the next case follows with
8 a guilty plea with a cooperation agreement, on and on and on,
9 that's in the pattern of this case, I'm talking about the
10 larger case, I'm talking about the auto parts generally, but
11 they certainly apply to the wire harness situation.

12 As to market, the other situation that has been
13 raised by Denso is that, well, there is no
14 interchangeability, the ECU is not a wire harness, this is a
15 simple matter, we are disconnected from the wire harness
16 conspiracy by doing so. I would ask the Court to take a look
17 at the Denso -- excuse me, the Yazaki and Furukawa plea
18 agreements and how the federal Government, how the DOJ,
19 computed the fines in each of those cases. They incorporated
20 the sales of ECU and wire harnesses over the relevant period,
21 determined in Yazaki it was \$2 billion, something like
22 \$800 million with respect to Furukawa. Once they had that
23 total number of both ECUs, related products, and the wire
24 harness, they took that total amount, found out what the
25 pecuniary gain was, went to the sentencing guidelines and

1 found the chart and determined what the fine was.

2 The point is that the DOJ clearly sees, as we do in
3 our complaint, that the same market pertains to both wire
4 harness and the related products. That's the way the DOJ
5 determined the fines, and that's the way both Furukawa and
6 Yazaki agreed to, they agreed to that computation. In other
7 words, putting those products all in the same relevant time,
8 determining the actual sales, both wire harness and ECU and
9 the related products, that they have described in those
10 agreements.

11 THE COURT: So wire harness and ECUs because that's
12 what we have now, but what happens when we get heater control
13 panels, do we add those in?

14 MR. DAMRELL: Those are not related products, Your
15 Honor.

16 THE COURT: Those aren't related products? Who
17 says they are not related products just because the DOJ --

18 MR. DAMRELL: Well, they are designated in the plea
19 agreements as they are in our complaint, and if I can just
20 find -- here. Automotive wire harnesses are automotive
21 electrical distribution systems, systems used to direct and
22 control electronic components, wiring and circuit boards.
23 The following are defined as related products for the
24 purposes of this plea agreement, automotive electrical
25 wiring, lead wire, assemblies, cable bond, automotive wiring

1 connectors.

2 THE COURT: I'm just -- I understand that but, you
3 know, not to be facetious but I'm just wondering if the DOJ
4 isn't going to come up and do what the MDL did and just
5 change this name to auto parts. Is that something we can
6 foresee?

7 MR. DAMRELL: Well, our complaint is fashioned upon
8 these plea agreements and how the Department of Justice
9 decided what they are going to include of components of the
10 wire harnesses.

11 THE COURT: Okay. Thank you.

12 MR. DAMRELL: Thank you.

13 THE COURT: Now, you have something to say?

14 MR. CHERRY: A little bit.

15 THE COURT: Okay, Mr. Cherry.

16 MR. CHERRY: You know, it all comes down to, you
17 know, as we cite and the case law is very clear, that you
18 can't be accused of a conspiracy for a product that you don't
19 sell, that you're not a competitor for. Their briefs refers
20 to the cases we cite and they don't dispute them, they say
21 they merely stand for the unremarkable proposition that a
22 horizontal conspiracy can only occur among competitors or
23 potential competitors in a given market.

24 And their argument -- Denso is not the one saying
25 it, it is their argument that 13 different products, 12 of

1 which we have never sold, are all the same market. Those are
2 their words, their argument, it is the crux of their whole
3 complaint. It falls apart without them proving that up. The
4 cases are very clear that you can't just say that, you can't
5 make it up. You have to allege facts to show it is the same
6 market. You have to allege facts that show
7 interchangeability of use among the products, that they can
8 be used for the same thing. You have to show pricing -- that
9 the prices have some relationship to each other.

10 In regard Elevator, in regard the Cement Concrete
11 case, their own case, the Chocolate case stands for that very
12 proposition.

13 THE COURT: But they are not really saying it, they
14 are reading from the pleas, they are saying the DOJ said --

15 MR. CHERRY: The DOJ never said that. They did not
16 use the word market. They have never referred to some wire
17 harness product market. They don't make that determination.
18 They did not do that here. Our plea doesn't have the words
19 wire harness are nowhere to be found in it. We had nothing
20 to do with wire harnesses, it is not in our plea, we don't
21 make them, we don't sell them, that's not us. You know, they
22 are just lumping us all together and calling it all one
23 market without any facts to support that.

24 THE COURT: Okay.

25 MR. DAMRELL: Can I say one more thing?

1 MR. CHERRY: The other thing -- can I just say one
2 more thing?

3 THE COURT: Just a little, he has a plane to catch.

4 MR. CHERRY: Oh, okay, well, let me start over
5 then, Your Honor.

6 The Government, we don't know why they lump these
7 things together for their own convenience and how they get to
8 the VOC. I mean, they certainly don't determine a market,
9 they don't use the word market, they don't talk about a
10 market. The fact that something is a related product clearly
11 doesn't mean it is the same thing, that it is fungible, that
12 it is the same market. You know, I think we talked about a
13 hubcap may be related to a tire. You can't use one for the
14 other. The pricing may have nothing to do with each other.
15 It doesn't mean the same thing.

16 He made some reference to their determining the
17 pecuniary gain, they don't do that, there is a formula under
18 the federal sentencing guidelines, that's how they get to the
19 fine.

20 Thank you, Your Honor.

21 THE COURT: All right.

22 MR. DAMRELL: Your Honor, just quickly, the
23 discountus (phonetic) max of the defendant utilizing the plea
24 agreement and then saying, well, we only pled to the ECU
25 conspiracy, and then counsel makes the comment we don't make

1 wire harnesses. Well, we don't know that, that's a factual
2 assertion. They may well sell wire harnesses, they may well
3 sell other components. The fact is that we pled that the ECU
4 was part of the wire harness system, that's our allegation.
5 Maybe discovery might develop that further, maybe it won't be
6 that effective once we get into discovery, but the fact
7 remains that's our claim. And as Judge Borman said, plea
8 agreements don't define plaintiffs' claims, plea agreements
9 are decided by negotiation, by the DOJ deciding that they
10 want to do this or that, and Denso decided they felt that
11 this is where they ought to come out, that has nothing to do
12 with this. The fact is we include ECUs in the system of wire
13 harnesses and the DOJ when it computed the fine, which it
14 did, which it did and factor in the -- again, it is all laid
15 out in the plea agreement. Based upon both the sales of the
16 wire harness and the ECU in the case of Yazaki and the case
17 of Furukawa, and they agreed to that, they agreed to that, it
18 would seem that on that basis we should be able to pursue our
19 claims despite what the negotiations were between.

20 THE COURT: So if they said that -- if they say
21 they don't make anything but the ECU --

22 MR. DAMRELL: I don't think that's the case, Your
23 Honor. I can offer some factual assertions because we have
24 evidence to the contrary that, in fact, they sell wire
25 harnesses. I mean, if we are going to get into that kind of

1 discussion that's not proper here in my view, but that's the
2 evidence that we have.

3 THE COURT: Okay. You better go check your product
4 line.

5 MR. CHERRY: Your Honor, we don't, and I think it
6 would be easy enough to find out. I don't think now is the
7 time to be saying, you know, we don't know if they do or we
8 don't, we need discovery to figure out if they even make the
9 product we are suing for. This is all on-line, our product
10 catalogue is on-line. If they are obligated to do anything
11 it is to do some basic research to know what their client
12 bought and to know what we sell and to figure out if they are
13 the same thing, and, you know, to know the basics of their
14 claims. We don't sell wire harnesses and we shouldn't be in
15 a case that is about a conspiracy to deal with wire
16 harnesses.

17 And, again, it is not just wire harnesses, it is 13
18 different products. The whole crux of this overarching
19 conspiracy claim they are bringing is that they are all the
20 same thing, that it is all one market but they don't allege
21 any facts to show that.

22 Thank you.

23 THE COURT: Is the ECU part of the electrical
24 system of a car?

25 MR. CHERRY: It is an electronic control unit. It

1 depends on what you mean by that.

2 THE COURT: I wouldn't know what the DOJ meant
3 but --

4 MR. CHERRY: Yeah, really, this idea too that these
5 13 different parts that it matters that the carmaker may plug
6 them in together in some way and make a system is irrelevant.
7 They are still different parts, they are sold by different
8 companies, different prices, they are in different markets.
9 They all go into a car. To say they all go into the car
10 makes them the same thing, I mean, you might as well say
11 that. They are still different parts, they are different
12 markets for each part, and it is just irrelevant that they
13 may go into some system by the person who is making the car.
14 We still don't make --

15 THE COURT: How do you define market, what is a
16 different market?

17 MR. CHERRY: Well, actually the law is very clear
18 on that. I mean, there is a definition in all of the case
19 law that the market depends on the interchangeability of the
20 products, that at some point you can interchange, that at
21 some pricing point you will substitute one product for the
22 other, that that is possible and you will do that at some
23 point given the economics of the deal, and they don't allege
24 that. You clearly can't use these products one for the
25 other, they are totally different things. They have alleged

1 that nothing --

2 THE COURT: Well, if that were true we would have
3 12 different products, would we not?

4 MR. CHERRY: Just as we have a heater control
5 product case and we have a --

6 THE COURT: I'm talking about the wire harness
7 case, if that were true in the wire harness we would have 12
8 parts to it?

9 MR. CHERRY: Certainly you would have a different
10 body ECU case, and as far as I know, I mean, we don't make
11 these other products, somebody who is in that market -- in
12 those particular products can speak to them but, yes, I think
13 you may end up with that situation where you have different
14 products, they are different things, one cannot in any way be
15 used for the other. The price of one does not affect the
16 price of the other. If you are selling one you run into
17 different competitors. They are different markets.

18 THE COURT: Okay.

19 MR. CHERRY: Thank you, Your Honor.

20 THE COURT: It seems like we keep coming up with
21 more questions rather than less.

22 MR. DAMRELL: The fact remains that
23 interchangeability is a -- there's a lot of subtleties to
24 that; you have markets and submarkets. You have cases in
25 this circuit that clearly indicate that you could have a wire

1 harness market and a submarket might include ECUs but that's
2 not our position. The fact remains is that the Department of
3 Justice prosecuted these conspiracies on the basis that wire
4 harness system, which it is called in their definition a
5 system, and that the various related products which I was
6 describing are part of that system. That's our allegation,
7 that's what we are suggesting. We think that is the same
8 market, we think it is the conspiracy relating to the same
9 products that make up wire harness systems, and that's the
10 basis of our claims.

11 THE COURT: Okay. Thank you. All right.

12 MR. ROMANO: May I proceed, Your Honor?

13 THE COURT: You may. Do you have a plane to catch
14 too?

15 MR. ROMANO: Good afternoon, Your Honor. My name
16 is Sal Romano, and with me is my partner Don Barnes, and we
17 represent GS Electech and its affiliated companies.

18 Earlier I handed up what I hope is a document that
19 will facilitate your agreeing with our argument in this case.
20 To start off with, you have heard a lot about Twombly. I
21 would like to focus the Court's attention on two principles
22 of Twombly that have peculiar application to our case. One
23 obviously is the definition of plausibility, the definition
24 of plausibility being that the plaintiffs must assert
25 sufficient factual content to allow for the reasonable

1 inference of the existence of the conspiracy that is pled in
2 their case.

3 Now, the problem that the plaintiffs have is that
4 they have pled a single conspiracy and they pled a global,
5 massive, overarching conspiracy that affects a whole -- what
6 they define as the wire harness industry. The problem that
7 they have is that the guilty pleas they have relied upon
8 primarily, particularly our guilty plea, don't support it.
9 In fact, what should be somewhat informative to the Court in
10 this case, and while I know the Government oftentimes does
11 not necessarily proceed on the basis of the investigation
12 that is being conducted, I can assure you if they thought
13 that this was an international cartel and that this
14 international cartel somehow fixed the prices on a global
15 basis and an overarching conspiracy for all of these
16 automotive parts, they would have charged somebody with it.
17 They might not have charged us because we are so small. They
18 may have charged some of the bigger players in the case.
19 They would have done that, they would not have walked away
20 from such a case, and they conducted an extensive and what
21 the plaintiffs have called a global investigation of this
22 industry.

23 To get to the point about the standard, not only is
24 that an important plausibility standard which calls upon the
25 Court to use its common sense and experience, to look at the

1 situation and then say yes, I believe that this could lead to
2 a probable violation, but there is another important aspect
3 of Twombly and that's the gatekeeper function. The Supreme
4 Court has decided that it needed the district courts to
5 operate as a gatekeeper not only at the point of summary
6 judgment, which it did with Matuszak, but at the earliest
7 point of the pleading stage in order to preserve the
8 integrity of the federal court system, which is being
9 overburdened, and in our case to protect small companies from
10 being overburdened with the massive discovery that takes
11 place in a complex, protracted antitrust litigation. This is
12 clearly going to be a massive, protracted antitrust case. It
13 is going to become an unwieldy massive antitrust if what is
14 really going on here is not some single conspiracy but a
15 bunch of smaller disparate conspiracies. It will be the type
16 of case that becomes so unwieldy it will become a morass and
17 maybe turn into a quagmire because it would be so disparate.
18 We don't want to be caught up in that, we don't want to get
19 caught up in something that we are not a part of.

20 But let's get to the point. Now, the principles
21 that I just announced were recently reconfirmed by the
22 Sixth Circuit in the case -- and I haven't had a chance to
23 analyze the case or read the case. I got a report of the
24 case, it is the case that involves the Ohio Police and Fire
25 vs. The Standard Employee and Financial Group, and it

1 reconfirms the importance of the two points that I just made
2 about the Twombly decision, and it made it in a context where
3 it actually refused to allow the plaintiff in that case to
4 amend the complaint and dismissed it with prejudice.

5 But to get to the real point of the plaintiffs'
6 case as it relates to GS Electech, they rely on two things.
7 One is the actual guilty plea itself and, two, somehow they
8 refer in a footnote to what went on at the hearings, and they
9 also throw in a bunch of boilerplates about this is a
10 Government investigation, you have to look at the whole thing
11 as a whole, but when you boil it all down and get to the
12 nitty-gritty all that is involved with GS Electech is its
13 guilty plea. The guilty plea of GS Electech, as I outlined
14 it to you before, does not support a participation in a
15 global conspiracy either by GS Electech or its affiliated
16 companies. And, in fact, first of all, the plea describes
17 GS Electech as an assembler of speed sensor wire assemblies,
18 not a manufacturer. So basically it is an assembler, it gets
19 the parts from somebody and it puts them together and it
20 assembles them.

21 The conspiracy involved only one other
22 co-conspirator, another company that was a co-conspirator,
23 not 5, not 6, not 7, not 10, not 15, just one other
24 co-conspirator. Only one manufacturer was the target. A
25 very small volume of commerce was involved. The Government

1 said \$11 million was the volume of commerce impacted by the
2 alleged conspiracy.

3 Now, what is ironic about that point, if you look
4 at the plaintiffs' complaints, and we are only responding to
5 the end payors and to the auto dealers because they are the
6 only complaints where any of us are mentioned, we are not
7 mentioned in the direct purchasers' complaint, but in the
8 complaints that I refer to they have a pie chart and they
9 also have a list of the companies and the amount of commerce
10 each company carries volume. We are in the others, and the
11 others is such a small fraction and we are such an
12 infinitesimal part of that small fraction that if somebody
13 wanted to create an international cartel I can assure you,
14 Your Honor, nobody would invite us to the meeting.

15 We get to the next point, and this is a point that
16 I think everybody has been trying to get their arms around,
17 the product that we sell is a product that is probably
18 somewhere between \$5 and \$10 per car. It is a very small,
19 low-end wire system, and it is just wires and a connector,
20 that's all it is. If you look at the list of products that
21 Maggie Sullivan had listed in her handout that she had given
22 to the Court, we don't make any of those more sophisticated
23 products. Those sophisticated products all function
24 differently than how our product functions. We don't compete
25 with those products. We don't make fuel boxes, ECUs or

1 anything else. It is extremely difficult to suggest that
2 somehow we conspired with them to fix a global market.

3 THE COURT: Are you saying you are not part of the
4 wire harness system or that you are too insignificant?

5 MR. ROMANO: I'm saying both. There is no such
6 thing -- I mean, they cited a case for instance -- you can
7 call almost any industry generic, and they cited the case, it
8 is in In Re: Polypropylene Carpet Antitrust Litigation,
9 178 Federal Rules Decision 603.

10 THE COURT: Okay.

11 MR. ROMANO: Now, admitted, in that case the number
12 of products was large but the court made it clear that it
13 disagreed with the concept that polypropylene carpet industry
14 products and markets are fungible, and the reason they said
15 it is because they performed different functions, not only
16 did they perform different functions but they were made to
17 different specifications.

18 What I want to emphasize in this case, you take
19 even this \$5 or \$10 piece of equipment that we sell, it is a
20 negotiation. A big company like maybe Toyota or Honda will
21 put out an RFQ, and the negotiation process starts but it is
22 not just a negotiation on price. Their engineers are
23 involved. They want to develop a better product for the next
24 generation of Camrys or whatever it is and so they have
25 engineers that say hey, we wanted to do X, we have engineers

1 that say we will work with you, and the engineers work back
2 and forth along with the negotiations, it is an extremely sui
3 generis process. You can't compare that product even with
4 another product that is being made for another function where
5 the same process is going on. The whole concept here is
6 automotive manufacturers want to make their cars as hi-tech
7 as they can make them so that consumers will buy them.
8 Someday they hope they are going to have cars on highways
9 where you press a button and say I want to go to Detroit and
10 you are in Washington, D.C. and it will take you to Detroit,
11 because it will be so much technology involved. These
12 products have a lot of hi-tech to them because they make
13 other hi-tech products work better. So that's one of the
14 reasons why the idea that they are competitive or homogeneous
15 or somehow fungible, that's not the case at all, and it will
16 be really unfortunate to find that out after six months of
17 discovery or five months of discovery.

18 It is incumbent upon the plaintiffs it to allege
19 factual information to supply the Court with the kind of
20 information so it can manage these cases, not only to state a
21 claim but state it in such a way where the Court can make a
22 determination whether this is one big conspiracy or not.

23 Now, the floor is not only the guilty plea, not
24 only does our guilty plea not support it, it undermines -- as
25 I described it, it undermines the concept of their theory of

1 a single global conspiracy, but what's even better than that,
2 Your Honor, and what makes this case extremely unique,
3 extremely unique, is the plaintiffs cite in one of their
4 footnotes to what happened at the hearing, and they cite to
5 the fact that the Government stated that somehow or other a
6 footnote -- on page -- well, I don't have it directly
7 available, but in a footnote they cite to the Government
8 saying at the transcript at the hearing that this case arose
9 out of its investigation. Well, what they did, Your Honor,
10 is they left out the good part, the part that helps us, they
11 left that out, but not only is it a good part it is an
12 extremely good part.

13 THE COURT: Glad it wasn't a footnote.

14 MR. ROMANO: They shouldn't have cited a footnote,
15 I don't think, but they did cite a footnote and they relied
16 on what the Government said in part, but what they left out
17 was what the Government judicially agreed to. In that
18 transcript a statement was made and the Government said we
19 agree with that statement, and the statement is the available
20 evidence neither indicates nor suggests that GS Electech was
21 a party to any overarching wire harness conspiracy involving
22 the companies which have been previously charged or have pled
23 guilty in this court including Furukawa and Yazaki and
24 certain other major suppliers. The plea agreement makes it
25 clear that GS Electech was involved with only one other

1 co-conspirator, so it is a two-company conspiracy, and that's
2 on pages 5 and 6 of the transcript, which is Exhibit B to our
3 motion, which is page 7 of our handout, Your Honor.

4 I think it is pretty clear from that statement by
5 the Government that it would be virtually impossible to infer
6 based on the allegations of the complaint, the guilty plea
7 and this statement, Your Honor, that somehow or other you
8 could draw an inference that we were participants or had
9 anything to do with an overarching, global, massive
10 conspiracy that the plaintiffs assert without any foundation,
11 by the way, is a conspiracy in this case.

12 So now the other point I would like to make and --

13 THE COURT: Who is the other company in the
14 two-company conspiracy?

15 MR. ROMANO: Excuse me?

16 THE COURT: Who is the other company in the
17 two-company conspiracy?

18 MR. ROMANO: Who was the other company?

19 THE COURT: Yes.

20 MR. ROMANO: My best information, the Government
21 would never tell us, we had to guess, but through other
22 sources we believe it is Sumitomo.

23 THE COURT: But you haven't been told that, you
24 haven't been officially told that by the Government or --

25 MR. ROMANO: Well, I wouldn't say -- I don't know

1 what the word officially means but we have been informed. I
2 would be less than honest if I said I wasn't informed of it
3 from a reliable source. I wouldn't call it official.

4 THE COURT: Well, assuming you pled guilty -- I
5 guess I should say this, assuming you pled guilty to
6 conspiracy you must have had somebody that you conspired
7 with, right, so you would have known?

8 MR. ROMANO: Well, one of the problems that you can
9 find in these situations, Your Honor, is you do your
10 investigation, the Government has done an incredible amount
11 of investigation, there is usually someone claiming leniency
12 in the case, so the Government has a certain leverage in
13 negotiating with you and you are trying to work it out so
14 that nobody goes to jail and the fine is as small as you can
15 make it, so you do the best you can under the circumstances.

16 But even if it -- it doesn't make any difference
17 whether we pled guilty with Sumitomo -- or we pled guilty and
18 Sumitomo was the other co-conspirator. The fact of the
19 matter is the Government clearly said we weren't part of
20 anything else, that's the important point. The important
21 point of the Government's concession is that they are saying
22 on the record, and they don't do it often, maybe almost --
23 I'm not familiar with it ever happening before but I'm sure,
24 you know, because I'm not familiar with it doesn't mean it
25 didn't happen, okay, but the point is that they don't go

1 around on the record and say, hey, this is a very limited
2 conspiracy, no one else is involved but one other conspirator
3 and they are not involved in any other global alleged
4 so-called or whatever conspiracy that is being asserted by
5 somebody. So I think that's a very telling point, it is not
6 something -- I mean, I don't think that in and of itself is
7 essential for our position but I think it is an imposition, I
8 think it makes it impossible, Your Honor, to infer that we
9 were part of a global conspiracy.

10 With all the evidence that the Government had
11 available to it and with the plaintiffs asserting ad nauseam
12 that the Government conducted this broad investigation and
13 then the upshot of it is that the Government concedes that we
14 weren't part of a global conspiracy, I think that's
15 compelling in terms of precluding the possibility of going
16 forward and being able to infer the existence of the
17 conspiracy.

18 Now, in the face of that we don't believe the Court
19 should ignore the important gatekeeper function that the
20 Supreme Court stated was part of the process. We believe
21 that this calls for the Court to look carefully at the
22 situation and indicate that this company should not be
23 exposed to the massive discovery and the protracted
24 litigation that is going to cost them millions of dollars and
25 maybe even disrupt their ability to be competitive in the

1 marketplace when there is almost nothing to support the very
2 claim that the plaintiffs are making.

3 With respect to the affiliated companies, Your
4 Honor, there are both subs, they are alleged to be subs.
5 Clearly if I'm correct and the Government's concession is
6 conclusive, which I believe that it is, then they go as well,
7 but even if I'm not correct it is pretty obvious to me if you
8 read the plaintiffs' 31-page brief that they are concerned
9 with their allegations with respect to the subs because they
10 only allege we are subs, they only allege that GS Wiring and
11 GS Manufacturing were companies that are wholly owned, they
12 don't allege they did anything wrong, they went to any
13 meetings or anything like that; that we implemented the
14 conspiracy in some manner, shape or form, they don't allege
15 anything of that. So it is fundamentally flawed as well as
16 with the subsidiary corporations.

17 If the Court has no questions I can make it as
18 short and sweet as you would like?

19 THE COURT: No, I'm fine. Very interesting point.
20 Okay.

21 MR. ROMANO: Thank you for your time and your
22 consideration, Your Honor.

23 THE COURT: Reply.

24 MR. DAVIDOW: Yes.

25 THE COURT: Let me ask first, you argued --

1 MR. DAVIDOW: I argued Leoni, Joel Davidow.

2 THE COURT: Wait a minute. Mr. Barnes, you weren't
3 adding anything to that argument, were you?

4 MR. BARNES: No, Your Honor. The only thing I
5 would add very briefly is that neither of the subsidiary
6 companies of GS Electech, specifically GSW Manufacturing or
7 GSW Wiring, neither of those companies pled guilty, they are
8 simply alleged to be subsidiaries, as Mr. Romano pointed out,
9 that clearly, clearly is insufficient under the standards
10 annunciated in Twombly and adopted by this Court.

11 THE COURT: Okay.

12 MR. DAVIDOW: Well, I will feel a little free on my
13 time because I think my opponent instead of 10 minutes went
14 about 25 but I will try to stay within 10.

15 THE COURT: You don't have to match it.

16 MR. DAVIDOW: And I have a plane to catch.

17 First, if I may interrupt for a moment, my team
18 would like to ask the Court to order that all slides be filed
19 so that people who aren't here could see what was on
20 everybody's slides. You can ask that everybody here who
21 presented a slide give it to the clerk so that it is
22 obtainable under the docket, the records.

23 THE COURT: Well, it will have to be filed as an
24 exhibit so I will have to ask my clerk about that
25 electronically, how it --

1 MR. DAVIDOW: I was asked to make the statement. I
2 have said --

3 THE COURT: Nothing is simple nowadays.

4 MR. DAVIDOW: I hope it is, it is just for fairness
5 of those who were here or not here to actually knowing what
6 occurred.

7 I think the case --

8 MR. MAROVITZ: Pardon me, Your Honor.
9 Andy Marovitz for Lear Corporation.

10 Would it make sense -- I mean, we are happy just to
11 serve it upon lead counsel for each of the plaintiff groups,
12 all the demonstrative slides, and that would avoid the need
13 for formal filing with the Court and that way plaintiffs
14 would receive it?

15 THE COURT: That would be very good.

16 MR. MAROVITZ: If we can receive the same courtesy
17 with respect to the plaintiffs?

18 THE COURT: Yes, if anybody submitted slides --

19 MR. DAVIDOW: My team says that I can accept that
20 offer, it is very gracious, and we will reciprocate. Thank
21 you.

22 To try to keep this fast, make my plane, miss
23 another dinner in Greektown, which was very good last night,
24 the lamb chops were excellent, I'm going to state five
25 principles of law that I think all of us in this field know,

1 including Your Honor, and those five or six principles really
2 end this case without, you know, a lot of other things.

3 The first principle is that when we sue each of the
4 defendants here who has pleaded guilty we don't have to know
5 that each of them sold every 1 of the 12 types of wire
6 harness. As far as I know Yazaki sold 7 of the 12 kinds, or
7 Sumitomo sold 4 of the -- there is simply no requirement that
8 says if you define a product area in which there was price
9 fixing and you sue people and they sold you something that
10 the Government listed they had to sell every product. Well,
11 then do we get to a minimum, that is if it is 4 of the 12 you
12 are still in but if it is 3 of the 12 you are out or so on?

13 Then I would ask to make a practical point, which
14 is there's lots of ways to run a bid rig. Just from
15 experience in my 40 years of fooling around with this stuff,
16 you could trade products, that is, it would be a bid rig to
17 say I will bid on ECUS this week if you will let me win on
18 the main wire harness next week. So even though that
19 particular deal wasn't ECU versus ECU, it was I will trade
20 you an ECU bid for you staying out so I can win a different
21 bid next week or something else.

22 Next there can be cooperative bids, that is if
23 somebody wants a wire harness and an ECU and they want a
24 price for both, two or three people can put together a
25 syndicate and they could have a syndicate in which they are

1 perfectly aware that they are going to fix the bid but the
2 bid is going to be a combination of three products, an ECU
3 and a harness or something else, in which case there are lots
4 of ways to run a bid rig, which we will learn gradually as
5 this case goes on, of what was traded, what was combined,
6 what was bid.

7 THE COURT: You aren't trying to convince them, are
8 you?

9 MR. DAVIDOW: It is not going to work.

10 MR. SANKBEIL: Can we vote now? Poll the jury,
11 Your Honor.

12 MR. DAVIDOW: It is not going to work. They are
13 beyond reason. Okay.

14 The third point is that Twombly wants to know
15 whether you have a claim that's not speculative. Well, if
16 GS Electech says in essence, yes, I did fix a price on a wire
17 harness product that has a dollar value and it went into
18 products which, let's say, we didn't -- you didn't ask him
19 the question of which car company it was. Let's say it was
20 Honda or Toyota. So it was a \$5 product, they talked to
21 Sumitomo, it went into a Honda, and among my dealers we have
22 Honda dealers, Toyota dealers, we have a class that would
23 include all the Honda dealers in America, all the Toyota
24 dealers, and at \$5 apiece, I think there's 300,000 dealers
25 and 7,000 Honda -- 7 million Honda Civics are sold, so at \$5

1 a Honda Civic, 7 million, it adds up and suddenly it is a lot
2 of money.

3 So the answer is when they pleaded guilty to fixing
4 prices on a product that is a wire harness with Sumitomo to
5 Honda which is then sold to my Honda dealers, the question is
6 is that speculation or is that a perfectly good Twombly case,
7 and the answer is it is a perfectly good case. We are not
8 making the case up.

9 The question then comes the lawyer for GS Electech
10 makes what my father would call a rachmonus (phonetic)
11 argument, which means compassion, it says we are very small
12 and it is awful that we might be in a very big case with a
13 very large thing when we only did a little piece of the
14 conspiracy, which is fine, but there are three answers to
15 that.

16 The first is the law to detour people doesn't read
17 that way. It says if you take a step to further the
18 conspiracy, which turns out to be big, you owe all of it,
19 joint and several liability for an overt act. The size of
20 the conspiracy can be determined as discovery goes on.

21 The second way of putting it is I didn't know I was
22 helping a big conspiracy. That can be absolutely true. If
23 GS Electech was asked by Sumitomo, look, don't ask us why, we
24 will do you a favor, don't go too low on this bid, and then
25 we put Sumitomo on the stand and say well, why did you say

1 that to GS Electech? Well, we had talked to Yazaki and so on
2 and we didn't want the prices to start going down, so to
3 prevent the whole thing from falling apart I asked Electech
4 to do it and they did it.

5 So the answer is it doesn't matter whether Electech
6 knew that Sumitomo had a great big elastic purpose in asking
7 them to fix that big. Whether they did or not is a straight
8 deposition question. I deposed the person from Sumitomo and
9 Yazaki who talked to Electech and say what was the
10 circumstances, why did you talk to others about going to see
11 Electech. It turns out yes or no either way. It is a trial
12 point.

13 The next point is, all right, so they are small.
14 Now, we have a law called Xperia, and that says if you are
15 the first to squeal, if you came in -- if Electech had come
16 in in the beginning then they would get Xperia rights and
17 Xperia rights would say very specifically in federal law 2004
18 that they cannot be punished for more money than their share
19 of the market. This would have been a wonderful strategy on
20 the part of Electech but they weren't quick enough, and since
21 you either get it or you don't, they missed the boat. They
22 are not under Xperia as a leniency candidate, and those are
23 the only people who escape joint and several liability for
24 the size of the conspiracy.

25 The last point, which is not for me to do but I

1 used to be a defense lawyer for clients for 20 years, is you
2 form a joint defense committee with a settlement committee
3 and to be reasonable you tell Electech that it only has to
4 contribute one percent to the settlement money because it
5 only made one percent, and that's a very just and reasonable
6 way for defendants to act but that's between them. And this
7 argument by Electech isn't for you, as the Judge, or for me,
8 it is for the defendants in allocating the settlement burden
9 on Electech. If they got Electech in a lot of trouble and
10 they want to get them out cheap they will get them out cheap,
11 but I don't have any legal duty to listen to this plea about
12 how Electech was -- what it was.

13 Lastly we come to the obvious point here, which
14 goes back to where we -- are in the case, and that is that we
15 know that they have conspired with a major player, we know
16 that the major players were are in all the products, we know
17 there was conversations about it, we don't know what was
18 said. We know the Government didn't want to go further but
19 we also know it was the rule of law that we have a lower
20 burden of proof and we are simply not bound by that. If we
21 think there is a 30 percent chance that the Electech
22 conspiracy was really part of a broader conspiracy, and we
23 can get that out by asking an even better question of the
24 person they talked to, we have an absolute right to use all
25 of our skill for our plaintiffs and try to prove that, and we

1 only need this slight evidence rule. I would say that the
2 case I cited was Flat Glass, which says that it only takes
3 slight evidence to add to the broader conspiracy. That was
4 written by Michael Chertoff, who I think is a magnificent
5 federal judge and the head of Homeland Security, and I would
6 certainly follow his wisdom on that.

7 I think those are the principles that govern this
8 case, and that I don't need any more time.

9 THE COURT: Thank you, Mr. Davidow.

10 Mr. Romano, we now know your share. If you would
11 get together and have a settlement conference.

12 MR. ROMANO: I would just like to make a couple of
13 points. One is it is nice to hear a generalization of what
14 generally happens. What generally happens isn't what
15 happened in this case however when the Government got up and
16 agreed with the statement and not only included Yazaki and
17 Furukawa but it said and other major suppliers. Now, they
18 didn't tell us at the time that one of those other major
19 suppliers was Sumitomo, they meant there was no meeting of
20 the minds between GS Electech and Sumitomo with respect to a
21 global, massive conspiracy assuming Sumitomo had such a plan.
22 There was no meeting of the mind by us. That is an essential
23 feature.

24 The cases that they cite where you don't have to
25 know all the details that a co-conspirator is involved in are

1 meaningless cases because all of those cases say as a
2 safeguard you must establish that there was a meeting of the
3 minds for the plan that is being charged as part of the
4 conspiracy, and they don't have that. They don't have it in
5 their pleading, and they don't have it because of the
6 Government's judicial concession, so on that score alone,
7 Your Honor, I think the argument to respond to us fails. I
8 think that's all I have to say.

9 THE COURT: Okay.

10 MR. BARNES: Nothing further.

11 THE COURT: All right. I think in checking we are
12 done. Did I miss anybody?

13 (No response.)

14 THE COURT: Anybody have any other comments?

15 (No response.)

16 THE COURT: Okay. Let me just say your briefing is
17 excellent, it is somewhat overwhelming. I kind of laugh with
18 my law clerk and I, I don't know how you put together all of
19 these thousands of pages. I like the charts, I like the way
20 that was all laid out, that was very good and it will be very
21 helpful. As I said to you yesterday, try and put your main
22 cases in the actual brief. I know you like footnotes, I used
23 to always tell my law clerks I don't read footnotes, I guess
24 it is a warning. We will do briefs. Really, I'm at an
25 absolute loss to tell you how long that would take. It was

1 my hope that I would get everything out in a couple of
2 months, and it still is my hope, but I don't know. I don't
3 know particularly with all the different states I found it
4 was very hard to read, and I read it and then I said what did
5 I just read. I'm sure you have had that experience.

6 So the Court will do opinions and we will get them
7 out as quickly as we can but we do want to probably take more
8 time on this first set because I see it as being something
9 that will be very important for every other part, though I'm
10 a little concerned with some of the arguments here as to
11 whether they should be separate parts and all of that other
12 kind of thing. We will see what happens. I do want to say
13 that you all did a marvelous job, and it is a real pleasure
14 to be working with you and to see the quality of work that
15 you do. It doesn't mean I'm going to approve a lot of fees
16 but I do appreciate your work. I wish you all a very good
17 holiday, and we will see you in March.

18 (Proceedings concluded at 3:40 p.m.)

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CERTIFICATION

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I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Automotive Parts Antitrust Litigation, Case No. 12-02311, on Thursday, December 6, 2012.

s/Robert L. Smith

Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 12/14/2012

Detroit, Michigan